The City of New York

POLICE DEPARTMENT

March 16, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Eric Ehlers
Tax Registry No. 933765
Housing Borough Manhattan
Disciplinary Case Nos. 82583/07, 82607/07 & 83275/07

The above-named member of the Department appeared before me on July 8, 2008 and July 9, 2008 and on August 6, 2008, August 20, 2008 and October 9, 2008, charged with the following:

Disciplinary Case No. 82583/07

1. Said Police Officer Eric Ehlers, assigned to Housing Bureau Manhattan Viper #1, on or about December 12, 2006, in Starkville, Mississippi, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: did wrongfully operate a motor vehicle while intoxicated.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Police Officer Eric Ehlers, assigned as indicated in Specification #1, while off-duty, on the date and location indicated in Specification #1, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Police Officer Eric Ehlers, assigned as indicated in Specification #1, while off-duty, on December 12, 2006, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: after having been arrested for Driving While Intoxicated, said Officer refused to submit to a Breathalyzer test.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

Disciplinary Case No. 82607/07

1. Said Police Officer Eric Ehlers, assigned to Housing Bureau Manhattan (VIPER 1) on or about January 24, 2007, at approximately 1450 hours, having been ordered by New York City Police Deputy Inspector Kevin Holloran to attend an out patient alcohol counseling program refused to comply with said order.

P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS-
GENERAL REGULATIONS

Disciplinary Case No. 83275/07

1. Said Police Officer Eric Ehlers, assigned to the Manhattan Housing Borough, on or about and between October 1, 2006 to November 31, 2006, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Office[1], with the intent to harass, alarm, or annoy a male civilian known to the Department, did place nineteen (19) telephone calls to said civilian after being directed not to call by said civilian.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT—
PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Police Officer Eric Ehlers assigned to the Manhattan Housing Borough, on or about and between October 1, 2006 to November 31, 2006, did wrongfully engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer, with the intent to harass, alarm, or annoy a female civilian known to the Department, did place about five hundred and twenty-five (525) telephone calls to said female's cellular and home telephone.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT—
PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Stephen Bonfa, Esq., Department Advocate's Office, and the Respondent was represented by Eric Sanders, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

[1] So in original

DECISION

Disciplinary Case No. 82583/07

The Respondent is found Not Guilty of Specification No. 1, and Guilty of Specification Nos. 2 & 3.

Disciplinary Case No. 82607/07

The Respondent is found Guilty of Specification No. 1.

Disciplinary Case No. 83275/07

The Respondent is found Not Guilty of Specification Nos. 1 & 2.

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SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Timothy Cook, Sergeant Mark Ballard, Sergeant Daniel Sweeney, and Inspector Kevin Holloran.

Police Officer Timothy Cook

Police Officer Timothy Cook has been a member of the Starkville, Mississippi Police Department for four years. He is assigned as a patrol officer of DUI (Driving Under the Influence) enforcement.

Cook was on duty on December 12, 2006, patrolling by himself in a marked vehicle, conducting traffic enforcement. He testified that on that day he saw a 2008 Ford truck with the license plate 98615JM leaving from a bar on the street he was on. The bar was named "The Dark Horse" and has a reputation as a high drug activity location. Cook observed the truck make a right-hand turn from the bar heading north and then saw the truck immediately turn into a set of apartments next to the intersection as soon as he turned behind the vehicle. The apartments were located about a block from the bar, and Cook stated that he drove "maybe a half mile and then turned around." He did not follow the truck into the parking lot and continued on his way. Cook did not stop before making the turn, nor did he make any observations of the truck as it parked in the apartment complex.

Cook testified that he was "straight across, kind of like sideways, side-to-side" in relation to the truck when it went into the parking lot. He continued to patrol, and at that point had not activated his lights or siren. Although he did not observe anything

suspicious at that point, after he had turned around and reached the intersection by the apartments he could see the driver and passenger of the truck sitting in the parked vehicle staring at him. The parking lot of the apartments was "street lit" and he was able to see the faces of the two males in the truck. Cook stated that he recognized the face of the passenger as a Mr. Tracy Hill, and stated that he had been arrested several times in the past for disorderly conduct and DUI. On another occasion, a SWAT team responded to his house for a suicide call and armed robbery suspects once used his vehicle and stayed at his residence along with a narcotics dealer.

Cook continued his patrol duties and notified another officer about this truck—a suspicious vehicle in the parking lot of the apartments. Soon afterwards, the other officer notified Cook that the truck had left the apartments and was headed north. Cook turned around and also went north in an attempt to discover where the vehicle was going. The vehicle then went to the residence of Hill.

At that time, Cook observed the driver of the vehicle, later identified as the Respondent, and Hill standing beside the truck, with a black male walking away from the truck. Cook testified that this residence was the location to which the SWAT team had previously responded to. He stated that he had not activated his lights or siren at this point, nor had he given a verbal command to stop. After observing the truck at Hill's residence, Cook proceeded up the street and parked in a church parking lot. He was unable to see the truck from this location. After five minutes passed, Cook subsequently observed the truck make a left-hand turn heading south after waiting at a red light. Cook pulled out and got behind the truck again, remaining approximately three car lengths behind. Cook still had not activated his lights or sirens.

The truck then pulled into the parking lot of a closed restaurant. Cook pulled into the school parking lot across the street. Shortly thereafter, the truck exited the parking lot, and as Cook pulled behind it again the truck "just stopped in the middle of the road." Cook did not activate his lights or siren nor did he give the Respondent any kind of voice command or direction to stop his truck. Cook reiterated that the truck stopped in the middle of the lane. He acknowledged that the Respondent's truck obstructed traffic because the road was only a two lane road; one lane in each direction.

Once the vehicle had stopped, Cook then activated his lights and got out of his car to investigate. Cook did not remove his sidearm from his holster. He approached the driver side of the vehicle and asked the Respondent, who was alone in the vehicle, for his identification. The driver's window was down and the street was "street lit." From about an arm's length away, Cook stated, "I just smelled the presence of an intoxicating beverage and noticed that his eyes seemed to be bloodshot...as we talked, I can smell it coming from his breath." Cook asked the Respondent why he had stopped in the middle of the road, and the Respondent stated that, "...he knew he was going to get pulled over anyway." Cook also asked the Respondent if he had been drinking, and the Respondent stated he had not. After repeating the question to the Respondent, the Respondent admitted that he consumed a couple drinks. The Respondent was still in the vehicle at this point, and Cook asked him to step outside.

Cook asked the Respondent if he would blow into a portable breathalyzer (PBT), which gives an approximate level of the alcohol level of the bloodstream "and basically picks up on the presence of alcohol." The Respondent took the test and the PBT

indicated that his blood alcohol level was at .11. According to Cook, having a blood alcohol level of .08 or greater is considered to be a misdemeanor in Mississippi.

Cook testified that he was trained in the usage of the PBT and has used it hundreds of times in his career as a police officer. He described the PBT machine as "just a small box. It has a tube that goes on top of it, and you just ask them to blow into it. When they start blowing, you match the button and it shows a reading on the machine."

Cook acknowledged that he also administered to the Respondent a number of field sobriety tests. He explained that he is qualified to administer these tests because he completed a course in standard field sobriety and is also trained as an instructor. He received certification for the completion of the course and indicated he was certified on December 12, 2006.

Cook stated that he asked the Respondent to take the series of field sobriety tests at the scene. At the time there was light traffic, and the Respondent performed the tests out of the roadway on a concrete sidewalk near the side of the vehicle. He stated that it was well-lit, and he could clearly see everything that was going on. He added that the sidewalk was dry, level, and smooth, without any kind of grade. Cook did not hold any kind of a conversation with the Respondent as they moved onto the sidewalk, although he was an arm's length away. Cook did not make any observations at that point regarding the physical condition of the Respondent. He noted that he could still smell the intoxicating beverage on the Respondent's breath.

The first test Cook administered to the Respondent was the "horizontal gaze and nystagmus" (HGN) test, which searches for "involuntary jerking of the eyes." He

directed the Respondent on how to complete the test, and the Respondent indicated he understood the directions. Cook described the fashion in which he performed the tests. He stated, "First, you check for physical impairments, and ask them if they have any physical impairments." The Respondent "didn't state that he had any." Cook further explained, "Then you check to see if they have [prescription eye] contacts. Basically, if they have hard contacts, the contacts may pop out. That's the only reason for the question." He indicated that contacts would not affect the test.

Cook then performed the actual HGN test, describing that "You ask them to stand feet together and hands down by their side and they follow your finger with their eyes and eyes only, until you tell them to stop. Basically, I stood. Basically just following my finger back and forth and I am just looking for the jerking in the eyes....When you start to move your finger, the eye will twitch and make a slight jerk. That's what you look for." He explained that the jerking of the eyes is indicative of nystagmus, which Cook noted is indicia of the presence of an "intoxicating beverage." A lack of jerking eye movements would indicate the lack of an intoxicating beverage.

Cook also explained the difference between sustained and distinct nystagmus. To search for sustained nystagmus the officer holds his finger off to one side in front of the subject's shoulders and keeps his finger there, searching for any jerking motion. Cook stated that he noticed a twitch in the Respondent's eyes indicating that he could not sustain looking at his finger, "... [His eye] would twitch, trying to go back."

Cook stated that the final part of the test involved "onset of nystagmus prior to 45 degrees." He explained, "You want to take about three steps, go out to about 45 degrees and come back on both sides." In performing this 45 degree test, there was also twitching

in the Respondent's eyes. Cook also noted that in performing the HGN tests, he noticed twitching in each of the Respondent's eyes.

Next, Cook performed "a one leg stand test" on the Respondent. He gave the directions to the Respondent, and the Respondent indicated he understood the directions. Cook stated that the procedure for this test is that "You have him stand still, feet together, hands down by his side, then I explain either foot you wish to choose, lift it off the ground six inches, and count out loud 1,001, 1,002, 1,003 and so on until I tell you to stop. It's 30 seconds. It takes 30 seconds. They have to count out loud, watch the foot, keep the foot elevated, and watch the foot at all times." He stated that the subject being tested chooses the foot and that his observation of the Respondent performing this test was that, "He dropped his foot and he raised his arms for balance...before the 30 seconds was up." He did not stumble, and he "maybe" swayed during this test, but Cook added that he was not supposed to raise his arms up.

Cook performed a third field sobriety test on the Respondent, known as "the walk and turn test." Cook instructed the Respondent on the proper procedure, and the Respondent indicated he understood these directions and attempted to perform the test. Cook stated that he "Found the line right there on the side of the roadway and had another officer watch traffic. What you do, you find a straight line...the [straight] yellow marking line." The line was easily perceived and was painted on black asphalt, and the area was well lit. The ground was level and was not wet. Explaining the test, Cook stated, "Basically, you find your line, you put your right foot in front of your left foot, heel/toe on the line, you put your hands down by your side, and that's the way you stand until I give the directions. Then you have to take nine heel/toe steps down the line like,

one, two, three and so on until you get to nine. Then you have to do a series of small steps and turn, and then nine more heel/toe steps back down the line." In addition to the verbal instructions, Cook also provided a demonstration of the test for the Respondent. As a result of the test Cook found two clues of intoxication, namely, that the Respondent raised his arms to balance and "...spun around on one foot" without making the required turn.

Cook testified he has been in private and personal settings where he witnessed individuals consume alcohol and become intoxicated and where individuals have not become intoxicated. He concluded that the Respondent was intoxicated. The Respondent was thereafter arrested, handcuffed and transported to the police station. Cook never drew his gun during this interaction, and stated that the only conversation between them involved the Respondent making a request for Cook's supervisor.

The distance from the location where the Respondent performed the field sobriety tests to the police station was about a mile. Officer Cohen was also present for the administration of the field sobriety tests. When Cook arrived at the station, he got a printout from his dispatch and went to the "intoxilyzer room." In that room, Cook read "the intoxilyzer warning[s] [located] on the machine" to the Respondent. These warnings state, "You have the right to refuse the intoxilyzer test which is being offered to determine your breath alcoholic content. Should you elect to refuse, your driver's license and/or driving privilege to operate a motor vehicle upon the streets and highways of this state shall be suspended for 90 days for a first offense, or for one year if you have been previously convicted of a violation 6311.30 Mississippi Code 1972." The Respondent indicated that he understood the warning and refused to take the test. Cook stated that

when somebody refuses to take the test they are automatically charged with a DUI. At the point of his refusal the Respondent was still requesting to speak to Cook's supervisor.

Cook testified that he has administered the intoxilyzer examination hundreds of times in his career and that he has also administered hundreds of field sobriety tests. Cook has been certified as a trainer of the field sobriety tests for two years and has conducted about five training sessions. Eventually Cook acquiesced to the Respondent's request for a supervisor and put him into contact with Sergeant Ballard. He stated that the Respondent and Ballard subsequently had a conversation in the large processing room next to the twelve by seven foot intoxilyzer room. Cook was also present for that conversation.

Cook further testified that only the Respondent and Cook were present in the small intoxilyzer room when Cook gave him the intoxilyzer warning, with two other officers present in the adjacent processing room. Cook was about an arm's reach from the Respondent and he could still smell an intoxicating beverage on his breath and observed that his eyes were bloodshot.

On cross-examination, Cook stated that officers of the Starkville Police Department were not required to take contemporaneous notes when they stop and arrest and individual. Cook does not keep an activity log because "Dispatch keeps activity." Cook acknowledged that he kept a memo book but that it was used for keeping track of how many tickets or citations he wrote and how many calls he went out on. He explained that if he stopped somebody in a suspicious vehicle and subsequently arrested them the information of all that occurred would appear in his arrest report.

Cook reiterated that the Respondent stopped his vehicle on his own and that Cook initiated his lights after the Respondent had already came to a stop in the middle of the road. He agreed that he originally saw the Respondent in his vehicle with another white male, Hill. Cook explained that Hill was arrested several times. Cook also added he was present when the SWAT team responded to Hill's residence in the past. Cook acknowledged that Hill was known to the police officers in Starkville but indicated that Hill's presence was not the reason for scrutinizing the truck. He explained that he spoke of the passenger in the car because "[t]hat's who was in the car with him. That's why I stated that was who was with him, and I knew him so."

When asked what was unique about the Respondent's vehicle being parked in the apartment complex Cook stated that "[i]t was just parked standing still and they were just watching me from the vehicle without getting out of the vehicle and going inside. Cook explained that many apartments in Starkville had "no loitering" notices posted and that sitting in a car in a lot was illegal, although he did not have any complaints of loitering regarding the Respondent's vehicle. Cook said that there were five or six more vehicles in addition to the Respondent's in the apartment lot. He explained that the apartment complex was very small, and agreed that it was not unusual for people to sit in a vehicle by an apartment complex if they lived there.

Cook admitted that he did not know if the Respondent had a lawful reason to be at the apartment complex. He stated that nothing else was unusual about the vehicle and stated that it had New York plates. Cook did not think it was unusual that a car with New York plates was parked in an apartment complex in Mississippi, explaining that it was merely the two passengers staring at him and remaining in the vehicle that drew his

attention. Cook acknowledged that he did not know why the Respondent was sitting in the vehicle and that at some point the vehicle did leave the apartment complex. He specified that he went in the same direction of the vehicle several minutes after it left but added that the vehicle had already stopped by the time he caught up. Cook acknowledged that other officers were in the area patrolling, and stated he notified the officers of a suspicious truck parked at the apartment complex. Cook further acknowledged that he explained to the other officers what was suspicious about the truck, citing the fact that they pulled out of a bar and immediately went into an apartment complex and sat in their vehicle. He found this behavior was suspicious and it drew his attention because in his experience as a "DUI officer" many times people "hide" in their vehicles after they drink. Cook did not witness any activity that would lead him to believe they were drinking in the vehicle.

Cook stated that after the truck went north on Montgomery Street it took a left on Critz Street. He was informed of this fact by other officers in the area. Cook testified that Officer Cohen then informed him that the truck stopped in front of a residence. He then drove past the location in order to see what the vehicle was doing at the time. Cook stated he went to that location to see if the vehicle was going to stay there or if it would attempt to hide. He elaborated, stating, "A lot of times when I get behind people that have been drinking, they leave the bars and turn into different locations just so I go by. They figure I will just keep going...They just turn in and not leave. And I turn and come back. They can pull out, I can turn around, and they pull into somewhere else. That's just what they do" to avoid being caught driving under the influence of alcohol.

Cook acknowledged that the behaviors he observed are still just assumptions of guilt until he actually catches somebody drinking. He explained the location on Montgomery was Hill's residence. He reiterated that Hill is a white male that he knows from his multiple arrests, involving DUI, disorderly conduct, and public drunkenness. Cook denied that there was anything illegal or improper about being at Hill's home, and explained that he wanted to see what the individuals in the vehicle were doing—if they got out there or continued on to another location. Cook observed individuals, including the Respondent, standing with the vehicle. Cook denied there was any illegal activity at the time, and stated that he just drove past the location. The vehicle eventually left that location, and he knew that because he had parked on the next street at a church where he could not see the residence and noticed the vehicle approach a red light. He stated that once the vehicle made a left turn Cook got behind the vehicle again.

Cook acknowledged that the vehicle signaled and made a proper left turn. The vehicle did not commit any traffic violations, and he continued to follow the vehicle "just to see where the vehicle was going to go." Cook explained that he went to the police academy in 2000, and remembered his training about vehicle stops. During this training he learned about suspicious vehicles and "approach and stop." He acknowledged that one of the two "bases" to stop a vehicle was probable cause, and that he would have probable cause if there was some sort of traffic violation. Cook denied having any reason to determine probable cause when he was following the truck. Cook acknowledged that the other acceptable reason to stop a vehicle was in the case of an exception to the Fourth Amendment. Cook conceded that he did not have an exception to the Fourth Amendment to stop and observe the vehicle, but further reiterated that he did not stop it.

Cook acknowledged that the Respondent could see Cook if he looked in his rear-view mirror, and that he could have seen multiple police cars following him all over Starkville. Cook did not know why the Respondent was in Mississippi, and said that he only later learned the Respondent went to school there.

Cook did not feel the vehicle was suspicious because it was driving around Starkville. He stated that people frequently make similar actions (referring to the vehicle hiding, etc) when they drive after drinking. Cook agreed that the Respondent was at a bar and that he followed him on Montgomery Street after he left the bar. After approximately ten minutes from the time the vehicle left the bar, Cook observed the truck turn into a restaurant, and he was behind the Respondent's vehicle at that point. He acknowledged the truck did not break any laws turning into the restaurant. Cook stated that he then pulled into the school across the street from the restaurant and stopped, explaining that he knew the restaurant was closed and that it was a dead end. At that point he knew that the truck had to come back out. According to Cook, there were no other vehicles in the parking lot, and the Respondent was by himself in his vehicle.

Cook stated that he did not know what the Respondent was doing in the vehicle, stating, "He just turned around in the parking lot and came right back out." When the Respondent exited the lot, Cook pulled out behind him and the truck stopped in the middle of the road. Cook said that the Respondent did not break any laws by pulling out, and acknowledged the vehicle was not swerving or making any other kind of movement on the roadway. He explained that the Respondent was driving his truck normally, and added that Cohen did not witness any swerving or inconsistent driving from the Respondent.

At that point, Cook indicated that the Respondent stopped in the middle of the road on Jackson Street close to Highway 12, and Cook turned on his lights and got out of his vehicle. Cook testified that there were a few other vehicles on the road and that Cohen pulled over with Cook at the time when the Respondent stopped his vehicle in the road. Cook was behind the Respondent's truck, and Cohen was behind Cook's car.

Cook explained that Jackson Street was a two-lane two-way street, and that the Respondent was on the right side of the road. Cook explained that there were pavement markings on the road, namely that there were double yellow lines in the middle of the road and a turn arrow for the parking lot. He stated that the Respondent's truck was stopped between the center line and the side line in the middle of the roadway. After the Respondent stopped, Cook stopped, activated his lights, got out, and approached the Respondent's vehicle. At this time the Respondent remained in the vehicle, which had a clear driver's side window.

Cook acknowledged that usually notes are kept of the arrest but that notes on the condition of the vehicle are not kept. He stated that he filled out an arrest report and added that the only notes he had were those found in the case file. Cook stated that they had a DUI form with space to write their observations of a person stopped for a DUI, but explained that they are not required to fill it out. He said the form was a DUI Field Sobriety Notice and that he had been trained to use the form in 2001 before he became a DUI specialist. Cook further explained that he had been taught that an officer could mark down what clues he or she found on the tested individual. He also stated that there was a section for all of the tests he gave to the Respondent, as well as a section for any statements made and observations.

Cook acknowledged that the form's purpose was to aid officers that had to testify in court in recalling the circumstances surrounding an arrest and that he could indicate on it that a subject refused to take a test and that it contained information regarding the driver's appearance and condition. Cook acknowledged he was trained to ask questions about any medical conditions which would make an individual seem intoxicated, and explained that the only question he had to ask was if they had any medical conditions. Cook agreed he had heard of diabetes, and knows based on his training and experience that a diabetic may smell like an intoxicated person. Cook stated that he asked the Respondent if he had any medical conditions and that the Respondent replied he had none. He also asked the Respondent if he had any physical impairment.

Cook acknowledged that he had learned in his training that some people can have a natural nystagmus in their eyes, but specified that one usually cannot observe it. Cook further acknowledged that he learned that he must use many different clues to come to the conclusion that an individual is intoxicated. He agreed that just eye movements, or lack thereof, does not prove one is intoxicated, although he stated that it is one of the signs. Cook also agreed that because a person does not possess good leg coordination they are not necessarily intoxicated. Cook acknowledged that his instructors told him that he must check if the subject has any kind of physical impairment before running his examinations. He denied observing any physical impairment of the Respondent, and stated that the Respondent was wearing boots.

Cook further explained he did not use the DUI Field Sobriety Notice the night of December 12 because all the observations he made can be found in the arrest report, as he is not required to use the form. He administered a PBT test to the Respondent. The

Respondent refused to take the test the first time he asked, as he merely stated that he did not want to take it. Cohen was present at this time. Cook reiterated that he approached the Respondent's car because he was parked in the middle of the road. Cook further explained that he could smell an intoxicating beverage on the Respondent's breath, leading him to suspect that the Respondent had been drinking. Cook told the Respondent "...I smell alcohol on you, I smelled an intoxicated beverage on you, and you have been drinking. I can't let you go. You have to at least let me check you out. If you don't let me check you out, he is going to have to go down to the station. If I check him out and he is okay, then he can leave. If I check him out and he is not okay, he still has to go to the station. At that time he blew into the PBT." Prior to taking the PBT test the Respondent asked to be allowed to return to his motel, but Cook informed him he had to "check [the Respondent] out."

Cook acknowledged that the Respondent did blow in the machine, and that it read .11. Cook denied testing or asking the Respondent to test again after he blew the .11. Cook also denied that the Respondent took three PBT tests and only refused once. Cook further denied that the Respondent blew a .00 at any time.

Cook acknowledged that he did not document the Respondent's .11 reading anywhere, and added that it was not documented "because that reading is inadmissible." He arrested the Respondent after he refused the machine test, 20 to 30 minutes after initially observing him at the bar. Cook stated that he testified in Mississippi about the Respondent twice, and agreed that the Respondent was found guilty at the lower level and then the case was dismissed at the next level.

Cook acknowledged that he took the Respondent to the intoxilyzer room when they arrived at the police station and that the Respondent refused to take the examination. Cook admitted that the video recording device in the intoxilyzer room did not function at the time of the Respondent's arrest, nor do they have a device in the intoxilyzer room to record voices. Cook acknowledged that he gave the Respondent warnings that if he refused to take the breathalyzer or intoxilyzer tests his license would be suspended. Cook denied that the Respondent had to sign any documents stating that he was warned, explaining that the machine printed out documents that were then given to the Respondent.

Cook denied that the Respondent swayed or stumbled at any point during the one leg stand test, nor did he sway or stumble during the walk turn test, although he did raise his arms and make an improper turn. Cook acknowledged that he has seen motorists in the past perform the field tests [and presumably fail] and not be intoxicated later, although he specified, "Very few." Cook however denied having ever witnessed somebody appear to be intoxicated in the HGN test and later discovering that they were not intoxicated. Cook admitted he has seen people fail the one leg stand test and not be intoxicated, but specified that the three tests together have an 80 percent standardized accuracy. Cook agreed that there could be other factors that contributed to bloodshot eyes, such as smoke or lack of sleep. Cook admitted he did not ask any questions about sleep deprivation, even though the stop was at 12:30 a.m.

On re-direct examination, Cook testified that one of the biggest universities in Mississippi is located in Starkville, and so an out of state plated vehicle is not unusual. Cook traveled west past Hill's house, and then turned north to pull into the church

parking lot facing south. Cook testified again that the Respondent drove his vehicle down Critz Street, and stated that he would not have observed the vehicle again had it remained at Hill's residence.

Cook stated that the vehicle stopped itself on Montgomery Street and did not pull to the side of the road. He also stated that the Respondent was not in handcuffs while Cook administered the PBT test, nor was Cook's gun drawn. Cook did not demand or order the Respondent to take the test. The Respondent was not combative in any way, and Cook does not harbor any ill feelings toward the Respondent.

Cook testified that if somebody had diabetes and blew into a PBT the device would not register the presence of alcohol. He determined that the Respondent was intoxicated as a result of all his observations, not just one in particular. The Respondent never indicated to Cook that he had any medical conditions such as diabetes, nor did the Respondent indicate he worked with any kind of acetone as part of his job functions.

Sergeant Mark Ballard

Sergeant Mark Ballard has been employed by the Starkville Police Department for ten years. His duties vary depending on assignment, but Ballard was assigned as the patrol supervisor on December 12, 2006, the night of the incident with the Respondent. Ballard stated that on that day his duties involved reporting to felony calls, proofreading reports, ensuring officers had necessary resources, and to be the point of contact for the police administration for any type of important incidents.

Ballard testified that on December 12, he became involved with an incident involving the Respondent. Officers in the field originally contacted him to verify the

Respondent's employment with the Department. Ballard contacted dispatch in order to have them perform a check, and then received a telephone call regarding the Respondent, who wished to speak to him in the processing room.

Ballard went into the processing room, located next to the room with the intoxilyzer, and observed the Respondent with Cook. The Respondent was leaving the intoxilyzer room as Ballard arrived, and he asked to speak to Ballard outside. Ballard stated that at that time "there were no suspects, no general public members, just officers in the room. I felt uncomfortable doing that, so I asked officers Ehlers, just directed him whatever he needed to say to me he could say right here."

Ballard entered into a conversation with the Respondent and the Respondent proceeded to asked him for help in the form of "professional courtesy." Ballard noted that "the room smelled of an intoxicating beverage" and he informed the Respondent that he "was compassionate for his position [and] understood that he was in a difficult situation; I told him that he had been drinking and driving and from what I knew the circumstances, he had attempted to elude officers and had denied drinking. I told him, let's start out, let's be honest. How much have you had to drink? Officer Ehlers' response was I had a six pack that afternoon and a triple shot at the Dark Horse that evening."

At that point Cook told Ballard that the Respondent had refused the intoxilyzer, and Ballard told the Respondent that he was neither in the position, meaning I did not have the authority, nor at this time did I see any way to interfere with the officers, and I could not unarrest him."

Ballard testified that the smell of the intoxicating beverage was "very noticeable" in the processing room, and it was "very distinct" that the Respondent had been drinking. Ballard further testified that the night the Respondent was brought in was a slow night, and no other individuals had been processed, nor had any other suspects been present in the room for several hours prior to the Respondent's arrest. According to Ballard, the processing room does not usually smell of alcohol and he determined that the smell of alcohol "was coming from Officer Ehler's breath." Ballard made his determination from an "arm's distance" from the Respondent where he also observed that the Respondent's eyes were bloodshot.

On cross-examination, Ballard acknowledged that he was a patrol supervisor that night and that as part of his duties he checked the arrest paperwork of people that were arrested. As such he checked the Respondent's arrest paperwork generated by Cook and stated that there were no notes or other contemporaneous documents that were prepared in the case other than the "checklist notes that they make discussing HGN and the arrest report. He did not observe Cook write any notes on any documents nor did he observe any "paperwork being done with arrest."

Ballard stated that he observed notes on the HGN form on the night of the incident and added that the HGN form was standard, and was like the DUI Field Sobriety report. Ballard did not know when Cook completed the paperwork, but he stated that it was completed at some point. He also stated that if his initials were not on it, then he did not review it and it may have been some other supervisor.

Ballard did not observe any paperwork being done that night, he merely reviewed it upon completion. He explained that Cook "was supposed" to fill out a form like the

DUI Field Sobriety report, but did not recall if he did or not. Ballard further explained that the reason he was supposed to fill out one of the forms was "for his personal notes for testimony," and added that it was at the officer's discretion whether or not to fill out the form. Ballard agreed that the form was useful for testifying in court. Ballard did not know all the details surrounding the arrest, and acknowledged that such was the reason why the form would be filled out.

Ballard denied making any notes about the conversation he had with the Respondent, and explained he did not do so because "there was no need to at the time." He stated that all the admissions made by the Respondent were notated by Cook. Ballard stated a call came in from the field requesting verification that the Respondent was a member of the Department. He could not recall if it was Cook or Cohen that called him.

Ballard acknowledged that he remembered being contacted by NYPD Internal Affairs Bureau (IAB), and also remembered giving a recorded interview on March 14, 2007. He could not recall if he informed them about the Respondent asking for a "professional courtesy," and stated that the Respondent never used the term "un-arrest." Ballard used the term to describe what he felt the Respondent's desires were, not as an actual quote from the Respondent. He added that the Respondent was courteous while speaking to him.

Ballard further acknowledged that the Respondent told him that he drank a "six pack" that afternoon around 3:30 p.m. He also explained that the arrest was made shortly after midnight. Ballard had made DUI arrests in the past and that he was formerly trained to do so, but was not currently certified. He did not know how many ounces of alcohol were burned per hour. Ballard acknowledged that the Respondent admitted to drinking a

triple shot at the bar, but made no documentation of that fact and was testifying from memory.

On re-direct examination, Ballard testified that with regard to the DUI Field Sobriety report "it is procedure that generally when the officers make arrests they make that for their records. He added that if his initials were on a DUI Field Sobriety report, he would have seen and reviewed it, but if his initials were not there, he could not recall specifically if he read it. Ballard acknowledged that he had no independent recollection of such a report.

Sergeant Daniel Sweeney

Sergeant Daniel Sweeney has been assigned to the Employee Relation Counseling Services Unit for five-and-a-half years and was a member of the command on January 24, 2007, where he met with the Respondent. Based upon that meeting Sweeney stated that "recommendations were made to the Respondent on steps to be taken to get back to full duty." According to Sweeney the Respondent did not comply with his recommendations and he was "post changed to the Medical Division."

On cross-examination, Sweeney acknowledged that the Respondent refused to comply with his recommendations and explained that the Respondent "told me he wouldn't take the recommendations."[2]

[2] Sweeney informed this Court during a conference prior to testifying that the Counseling Unit has certain obligations towards maintaining confidentiality and therefore his testimony would be somewhat limited in nature.

Inspector Kevin Holloran

Inspector Kevin Holloran has been at the Medical Division for seven years. His duties include overseeing the health and welfare of the entire Department and screening candidates for suitability for becoming a police officer or various other titles. Holloran was on duty at 2:50 p.m. on January 24, 2007, when he met with the Respondent. He stated that he met with the Respondent because he "got a phone call from the Counseling Unit saying that they were sending him over there, and I was then to meet with him to order him, give him a directive to comply with all the orders of the Counseling Unit." While Holloran did not remember who he spoke with he recalled that "their conversation with me was that he was refusing to comply with their recommendations....To go into the counseling program."

Holloran entered into a conversation with the Respondent and "told him that his failure to comply with their directives could result in his suspension." Holloran explained that the conversation with the Respondent "was that the Counseling Unit...had made a determination. And although I am not an expert, it's my job to actually make sure that he complies with any orders that they give regarding that determination." He added that direction that the Respondent received "was to go into the outpatient program [and] he indicated that he was not going to comply with that....with the directives of the Counseling Unit."

Holloran then gave the Respondent a direct order in that he "told him I was giving him a direct order to comply with the directives of the Counseling Unit." The Respondent indicated that he understood Holloran's order but nevertheless refused to comply with Holloran's direct order and Holloran suspended him.

On cross-examination, Holloran explained that he first saw the Respondent at approximately 3:00 p.m. on January 24, 2007. Holloran stated that the Respondent refused to comply with the directives of the Counseling Unit in that he refused to enter the outpatient program "because he wanted conditions set and so he wouldn't comply completely with what they were directing him to do." Holloran acknowledged that he had a conversation with the Respondent prior to suspending him and that the Respondent told him that he refused to comply at the direction of his attorney.

Holloran could not recall whether or not the Respondent stated he would sign any documents, nor could he recall why exactly the Respondent did to not comply with the orders of the Counseling Unit.

On re-direct examination, Holloran testified it was not his duty at the Medical Division to make an independent assessment as to anything the Respondent may or may not need to do, stating that he relied upon the determination of the Counseling Unit.

Lieutenant Eddy Diamantis

Diamantis is assigned as a team leader in the Bronx Investigations Unit. His duties include supervising three sergeants as they investigate allegations of misconduct by members of the service assigned to the Bronx.

On November 8, 2006, Diamantis received a complaint routed from the IAB Commander Center. He stated that a man named Scott Niemann called IAB and alleged that the Respondent was harassing him and dating his wife, Danielle Niemann. Diamantis investigated the case as a "call out" investigation with the Bronx Duty Captain, Captain Fitzgibbon. They interviewed the Niemann's and conducted an Official

Department Interview of the Respondent. After the interview, Fitzgibbons placed the Respondent on modified duty. Diamantis then said he did "follow-up work" including requesting the Respondent's telephone records.

Diamantis testified that the interview of Scott and Danielle was conducted over the telephone on either November 8 or 9 of 2006. The interviews were recorded on an audio cassette. The recording, however, could not be located where the recordings are regularly stored in the Bronx Investigations office. Despite Diamantis' efforts to locate the tape, he admitted it remains lost and he has no idea where it might be found.

Diamantis stated that a synopsis of the recordings of Scott's and Danielle's interviews was recorded on a "49" of the incident (DX 1).[3] Diamantis stated that the date on the 49 is November 8, 2006 the night of the incident. He stated that no additional worksheet was prepared to the "call-out" or interview of the Niemann's because "on the original call outs, we memorialize everything on the 49. There was no worksheets. It's just a paragraph within the 49."

Upon inquiry by the Court, Diamantis testified that he generated the November 8, 49 with Retired Sergeant Valdivia and Captain Fitzgibbon. Only Fitzgibbon signed this document. Diamantis said, "I typed a portion of it. I don't remember exactly which portion of it, and then I did the interviews along with Sergeant Valdivia and the Captain." The substance of the interviews in the 49 came from a compilation of Diamantis, Valdivia and Fitzgibbon's notes. Diamantis reviewed the 49 after its completion and indicated that it represented an accurate general account of what Scott and Danielle said during their interviews.

[3] A "49" refers to a "UF-49," an official Department memo.

Diamantis testified to the content of his interviews of Scott and Danielle. He said, "Mr. Niemann stated that Officer Ehlers had called him numerous times and called his home. And he was, you know, he was annoyed by that. And he also stated that he felt that it was rumored in the neighborhood that Officer Ehlers was seeing his wife, Danielle Niemann." Diamantis added that Scott spoke with the Respondent over the telephone in the past and asked him to stop calling his house.

Diamantis was asked by Counsel, "Is there anything on that 49—do you remember anything independently of that 49 in this case?" and he replied, "Somewhat, sir." This Court then stated to Diamantis, "But you can see every time you are being asked a question, you have to look at the 49. So you don't really have an independent recollection of this case, again, that's worth any substance with regard to just your memory of the case; is that fair to say?" Diamantis replied "Yes" and added that "Throughout the course of the investigation, I did contact them [the Niemann's]. They were uncooperative...wouldn't return phone calls, things of that nature." While he did not discuss appearing at this Court with them, he did say that he wished to conduct a follow up interview within a month after the initial November 8 interview, a request that was refused by the Niemann's. Diamantis said that Scott Niemann in refusing to cooperate told him, "...I just want to move on. I just want to put this behind me."

Diamantis obtained telephone records during the course of his investigation. He reviewed, in court, a certification with telephone records pertaining to telephone number (845) 988-1181 from Dobson Communications (DX 2) and determined that the Respondent used this telephone number and added he knew this because the Respondent had provided this number during his Official Department Interview.

On questioning by the Court, Diamantis testified that the Respondent called Scott and Danielle, and that they objected to receiving these telephone calls. He cross-referenced the telephone numbers, cell phone and home numbers, given to him by Scott and Danielle during their interviews with the records provided by Dobson Communications, and discovered the records contained these numbers.

On further direct examination, Diamantis acknowledged that the records reflected the time period between October 1, 2006, and November 30, 2006. Diamantis explained he highlighted the telephone numbers of Scott and Danielle on DX 2 when he checked their numbers against the numbers in the telephone record and that such highlights were not present in the document when he received it from the telephone company. Diamantis noted that Danielle's cellular telephone number was (845) 222-4290. The Court noted that on the top of the first highlighted page of the records, page 10, the account name reads Dorothy Ehlers ("Dorothy"). Diamantis explained that Dorothy was the Respondent's mother. A worksheet indicating to whom each number belongs to was added to DX 2.

Diamantis explained that the copy of the records he received from the phone company began on page three. He stated that he did not remove any pages from the packet, nor did anyone in his group remove pages to his knowledge. Diamantis reviewed the telephone records and determined that the Respondent made 19 telephone calls to Scott and 525 telephone calls to Danielle between October 1 and November 31, 2006. Diamantis could not confirm or deny conversations were held between the Respondent and Scott or Danielle during these telephone calls, and he explained that "I don't know if

there were any conversations. I am just saying there were calls made to....The phone records indicate the duration of the calls."

[The following is the sum and substance of the statements made by Scott and Danielle and recorded in the aforementioned 49:

Scott Niemann

On Wednesday, November 8, 2006, at approximately 1446 hours, Mr. Scott Niemann, male, White, 36 years of age, address known to this Department, called the Internal Affairs Command Center and informed Detective Reynolds, that his wife, Danielle Niemann, female, White, 35 years of age, has been having an affair with Police Officer Eric Ehlers. Mr. Niemann went on to explain that he is estranged from his wife but that they live in the same household with their five (5) year old son. Mr. Niemann stated that Officer Ehlers and Danielle Niemann ended their relationship several months ago, but that Officer Ehlers has been harassing he and his wife by calling their home and cell numbers continuously. Although Mr. Niemann stated there were no overt threats made by Officer Ehlers, these calls were annoying and disruptive in nature. Mr. Niemann stated that he was informed by his wife that on one occasion on an unknown date, Officer Ehlers was involved in a verbal altercation with Danielle in which he was alleged to have stated he was going to get his gun from his car. Mr. Niemann was also informed by his wife that on another undisclosed date, Officer Ehlers was alleged to have broken into their residence and got into a physical altercation with Danielle Niemann. Mr. Niemann stated that he did not witness either of these incidents and that his wife did not report it to the police. On November 8, 2006 at approximately 0130 hours, Mr. Niemann stated he received numerous calls from Officer Ehlers in which he stated that his wife, Danielle, was out at a bar with another man. Mr. Niemann stated that at approximately 0230 hours, an unidentified male, wearing a hooded sweatshirt and cargo pants came to his residence and began banging on the door and ringing the bell. Although he could not identify the individual, he believed it to be Officer Ehlers. Mr. Niemann stated that he called 911 and the New York State Police arrived a short time later. Mr. Niemann stated that the Troopers told him that they would prepare a complaint for harassment on his behalf. Mr. Niemann stated that he decided to call the Internal Affairs Bureau because he was tired of being harassed by Officer Ehlers and wanted it to stop. The undersigned was notified by the Internal Affairs Command Center of the allegations, and immediately requested the assistance of the Bronx Investigations Unit, and commenced this investigation.

In addition, Mr. Niemann stated that he became aware that his wife was having an affair with Officer Ehlers through gossip in the neighborhood. He stated that he first met Officer Ehlers when he came home and his wife introduced him as a friend. By his own admission, Mr. Niemann returned Officer Ehlers' calls on numerous occasions in an effort to get him to stop the phone calls. Mr. Niemann stated that he became aware of the incident in which Officer Ehlers was alleged to have broken into his residence, a week later when his wife informed him. Mr. Niemann stated that although he doesn't recall the date of this alleged incident, he knows that he was not home because he spent the night at a hotel in Manhattan after performing a double shift at work. Mr. Niemann stated that although he was upset when he found out about the incident, he did not report it to the police. (DX 1)

Danielle Niemann

In addition, Mrs. Niemann stated that she was in a relationship with Officer Ehlers for approximately one and a half years and that she recently broke up with him in early September. Mrs. Niemann stated that Officer Ehlers has been calling her continuously at home and on her cell phone for several months in an effort to rekindle their relationship. By her own admission, Mrs. Neimann stated that she returned his phone calls on a few occasions. Mrs. Niemann stated that on October 13, 2006 she received numerous telephone calls from Officer Ehlers asking her to get together with him. Mrs. Niemann told Officer Ehlers to meet her at McMinions bar located in Monroe, New York. Mrs. Niemann knew that her husband Scott was at the establishment with some friends and that she sent Officer Ehlers there under false pretenses in order to provoke an altercation between Officer Ehlers and her husband. Mrs. Niemann stated that later that night at approximately 0100 hours, Officer Ehlers came to her residence and began banging on the door and yelling "You set me up", (sic) but she did not open the door for him. Mrs. Niemann stated that a short time later, while she was upstairs in her bedroom, she heard a noise and went to investigate when she discovered Officer Ehlers inside her residence. She stated that she began to push him and subsequently tore a chain off of his neck, at which time Officer Ehlers fled the house. Mrs. Niemann surmised that Officer Ehlers used a credit card to open the door because she observed one in his hands when she encountered him in the house. Mrs. Niemann stated that at approximately 0400 hours, she heard another noise and when she went to investigate, she observed Officer Ehlers attempting to gain entry through the front door again with a credit card, but was unable to because she had secured it with a deadbolt lock. Mrs. Niemann stated that she did not call the police because Officer Ehlers' deceased father was the former Chief of Police in the town and that she felt that the police would not take any action against Officer

> Ehlers. Mrs. Niemann also stated that Officer Ehlers mentioned to her on many occasions that if she ever reported him to the police, it would be to no avail due to the fact that his father was a former local Chief of Police. Mrs. Niemann also stated that on one other occasion she was with some friends at Henry John's Tavern, located in Chester New York when she encountered Officer Ehlers and a verbal altercation ensued. Mrs. Niemann was evasive when asked by the undersigned about the incident involving Officer Ehlers statement about getting his gun. Initially, Mrs. Niemann stated that she did not recall the incident, but then went on to explain that she vaguely recalled an incident in which she stated to Officer Ehlers, "I'm going to kill you" to which he responded "I'll go get my gun." Mrs. Niemann stated that she was not interested in pursuing criminal charges against Officer Ehlers, but wanted him to stop harassing her.] (DX 1)

On cross-examination, Diamantis stated that did not know the reason why the Respondent placed the calls to the Niemanns and explained that "I am just going based off the phone records." When asked if he attempted to ascertain the purpose of these calls during his investigation, Diamantis responded that Scott indicated to him that he had returned "a couple of phone calls" to the Respondent in an attempt to get the Respondent to cease making calls.

Diamantis explained that he received the records on April 11, 2007. He wanted to conduct follow-up interviews with Danielle and Scott, but stated "they were uncooperative." Diamantis also explained that the basis for substantiating the charges against the Respondent came from a culmination of all the investigative steps, the Niemann's interviews as well as the telephone records. He came to the conclusion of aggravated harassment based upon the interview with Scott and Danielle taken on November 8, 2006, where they indicated that the number of telephone calls annoyed them and had asked the Respondent to cease.

Diamantis stated that Scott and Danielle lived at a residence in upstate New York, specifically 15 Esther Lane in Florida, New York. He said that Scott and Danielle were

legally married at that point and that they were living together during the time of the incident. He acknowledged that he conducted an Official Department Interview of the Respondent and explained that during the interview the Respondent indicated he knew Scott and Danielle to still be married and that he (the Respondent) was dating Danielle. Diamantis did not recall the Respondent saying that he had keys to their residence, nor did he recall being informed that Scott did not live at their residence during the time period in which the calls were made. Diamantis explained that to the best of his recollection Scott was living at his residence.

Diamantis explained that in preparation for his testimony he read the 49 and reviewed the case folder, including the Respondent's Official Department Interview. To Diamantis' recollection, the Respondent indicated he made the telephone calls to Danielle "because he cared about her." Diamantis reiterated that the Respondent indicated he had a relationship with Danielle, and stated that the Respondent also indicated Danielle had some type of problem with drugs. He acknowledged that at one point Danielle "set up" the Respondent by sending him to a bar where Scott was present.

Diamantis acknowledged that he was in a position as a lieutenant that allowed him to make credibility determinations of complainants, and agreed he found it "suspect" that Danielle placed the Respondent in a location where he could be the subject of allegations. He further acknowledged that all this information was in the 49, and explained that Danielle indicated both to him and the Respondent that she wanted the Respondent to stop calling her. Diamantis indicated that after the incident on November 8 the telephone calls stopped, but added that Scott and Danielle had previously told him "on numerous occasions to stop making the calls." He explained that Scott called IAB on

November 8, and was not sure if the Respondent stopped calling due to Scott and Danielle's requests or per the instructions of his captain.

Diamantis acknowledged that during the course of his investigation the Respondent told him that he had made a complaint to his integrity control officer (ICO) in the 47 Precinct that Danielle planned on bringing false allegations against him, and provided Diamantis with a 49 he had prepared. (RX B) Diamantis stated that he received a 49 prepared by the assistant ICO from the 47 Precinct, Sergeant Falkenberg, regarding the possibility Danielle would make false allegations against the Respondent. (RX C) He explained that these documents were "added to the record" and that they factored into the credibility of the complainants.

Diamantis testified he received the 49 prepared by the Respondent to the ICO (RX B) on November 8, 2006, the day he prepared the 49 regarding the complaint (DX 1) with Fitzgibbon. He explained that the Respondent prepared his 49 on October 23, 2006. The 49 indicated that Danielle had a problem with drug use and the Respondent severed all ties, and additionally included information that Danielle was planning on going to the Respondent's place of employment and ending his job "by whatever means necessary." (RX B)

Diamantis explained that he could not reach the ICO of the 47 Precinct on November 8 due to the late hour, although he did recall speaking to the ICO's assistant on a later date. He admitted he never spoke with the ICO of the 47 Precinct. He also admitted he did not generate a worksheet regarding his interview with the ICO's assistant. Diamantis could not recall whether or not he or any member of his team asked Danielle if she made false allegations against the Respondent. He agreed that if the

question was asked, the 49 (DX 1) would reference it. Diamantis did not recall asking Scott a similar question.

Diamantis acknowledged he had received another 49 on November 8 written by Falkenburg, dated October 23, 2006, regarding false accusations against the Respondent (RX C). He explained that he did not create a worksheet regarding his interview with Falkenburg, stating, "I believe he was in my office on an unrelated matter and I had asked him about it." He further explained his conversation involved the fact that Falkenburg should have notified IAB so that the 49 could be "memorialized correctly because the 49 that he prepared is not in accordance to this Department procedures regarding off-duty incidents." Diamantis acknowledged that the 49 referenced an attempt by the assistant ICO to contact his commanding officer in order to inform him that one of his subordinates may be the subject of false allegations in the future. He also agreed that his conversation with Falkenburg was relevant to the open allegation against the Respondent, and admitted relevant conversations should be memorialized on a worksheet.

Diamantis received the telephone records (DX 2) several months after the initial accusation, and acknowledged that he attempted to determine if the telephone calls were consensual by both parties. He explained that he generated 13 worksheets in the course of investigating the case, and admitted no worksheet indicated that he attempted to call Scott or Danielle after receiving the telephone records. Diamantis denied knowing whether or not Scott or Danielle attempted to contact the Respondent after the telephone records were received, nor did he re-interview the Respondent after acquiring the records. When asked why he did not re-interview the Respondent, Diamantis stated, "There wasn't a need to." Diamantis denied feeling it was important to ask him why certain

phone calls lasted two or ten minutes, nor did he feel it was necessary to ask the Respondent the origin of the numerous calls from blocked numbers on the telephone records.

Diamantis stated that he could only guess at the blocked numbers, and could not reply when asked if the Respondent could have told him the blocked calls came from Scott or Danielle if interviewed. Diamantis explained that the telephone records showed both incoming and outgoing calls. Diamantis did not recall asking the Respondent from which numbers Scott and Danielle called him, and agreed that knowing the number was important. Diamantis stated that Scott provided him with his telephone numbers, but agreed it was possible Scott could have called the Respondent from more than one number. He also agreed that the only people who could inform him of the numbers Scott used to call the Respondent were the Respondent and Scott himself. Diamantis added that Scott and Danielle both provided two phone numbers during their interview.

Diamantis explained that the Respondent was asked if Danielle called him from her cellular telephone or her home phone, and agreed the telephone records contained a large number of blocked calls. Diamantis further agreed it was part of his duties to ascertain the origin of the incoming or outgoing numbers in order to gain evidence on the Respondent or exonerate him, and claimed that he did investigate the telephone numbers in this case. Diamantis acknowledged that he only checked the numbers provided to him by the complainants. He did not check the other numbers in the Respondent's records "because [they] could have been family members or work related." He agreed it was possible that the other numbers could have been Scott or Danielle calling from other

numbers. Diamantis also agreed that the Respondent indicated in his Official Department Interview that he had numerous conversations with Scott or Danielle.

Diamantis said the phone number belonged to the Respondent's mother, and added that the Respondent provided that telephone number as his cellular telephone number at his Official Department Interview.

On re-direct examination, Diamantis stated he found calls from Scott or Danielle's home or cellular telephone to the Respondent's number, and upon inquiry from the Court, indicated that it was he who highlighted these telephone calls.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent is a four year member of the Department currently assigned to the Housing Bureau, Manhattan.

The Respondent testified that he traveled to Starkville, Mississippi to visit college friends while he worked in the 47 Precinct, around December 12, 2006. He previously attended graduate school for two years at Mississippi State University, in close proximity to Starkville, and was familiar with the area as a result of residing there while in school. The Respondent stated he still had friends that lived in Starkville, Mississippi.

On December 12, 2006, the Respondent traveled just south of Starkville. As he returned to the city a friend, Tracy Hill, contacted him and requested a ride home from a restaurant. The Respondent traveled to the restaurant, called Dave's Dark Horse

(Dave's), and ate dinner there. As he left the restaurant, the Respondent made a left-hand turn and noticed a Starkville police car parked across the street in a car wash. The Respondent knew Hill because Hill worked for the university while the Respondent was in attendance.

Hill, a white male, was seated on the passenger's side of the Respondent's Ford pickup truck, which is "raised up" with tinted side and back windows. The Respondent explained he arrived at Dave's on Highway 12 at approximately 10:30 p.m. He stayed there for an hour as he ate dinner.

When the Respondent left Dave's he noticed that there was one white male police officer in the Starkville police car parked in the car wash. As the Respondent made a left-hand turn out of the restaurant to begin heading south, the police car immediately pulled out behind him and followed him to a red light. The Respondent then made a right turn onto Montgomery Street and the police car continued to follow him. The Respondent pulled into the parking lot of an apartment complex in order to answer his cellular telephone, and the police car drove by very slowly, but the Respondent was not sure if it was the same car. He added another police car later drove past the parking lot.

The Respondent stated he was unaware if talking on a cellular telephone while driving was illegal in Starkville, so he pulled into the parking lot to use his phone. None of the Respondent's friends lived at the apartment complex. After talking on his cell phone "for a little while," the Respondent left the complex and turned right onto Montgomery Street. He continued to the next intersection where he made a left onto Critz Street in order to go to Hill's residence.

As the Respondent pulled into Hill's yard, "a black male, unknown to me, had no idea who he was, ran down the sidewalk across the road and out of sight." The Respondent noted that a Starkville police car was again behind him as he pulled into Hill's private two story residence. He explained that the driveway was in the front of the house and that there was "very limited" traffic on that street.

The Starkville police vehicles did not attempt to stop the Respondent at any point prior to his arrival at Hill's residence. After the Respondent pulled into Hill's driveway the police car drove by "very slowly" up the hill and "out of sight." The Respondent eventually left Hill's residence and went to Jackson Street, where he made a left-hand turn. As he turned, he noticed a police car in a church parking lot at the corner of Critz and Jackson. The police car got behind the Respondent as he was on Jackson Street. The Respondent stated the vehicle followed him through the next intersection, driving very close to his car, "right on my bumper."

The Respondent got off the street at the next available parking lot in order to see if the police officer wanted to speak with him, as the officer had been following the Respondent for almost half an hour. The parking lot belonged to a closed restaurant. The police officer in the vehicle continued past the Respondent and over a hill, watching the Respondent. The Respondent proceeded on Jackson Street and made a right-hand turn. As he crested the hill, three Starkville police cars stopped him.

The Respondent explained that one police car was parked on the left-hand side of the road in a school parking lot on the hill and that car pulled out from the parking lot with his lights on as the Respondent passed. The other two police vehicles came from behind the Respondent. All three vehicles parked in a straight line behind the

Respondent's truck after they stopped him. The Respondent testified, "I was in the right-hand lane because there is a curb and the sidewalk, so there is no place to get out of the roadway, so I was parked in the roadway." The Respondent believed Jackson Street had four lanes, with a turning lane on each side to enter the school.

After the Respondent stopped his vehicle on the side of the road, Cook approached the Respondent's truck on the driver's side and identified himself. The Respondent identified himself as a police officer and handed Cook his Department identification card, his vehicle paperwork, and his license. The Respondent stated, "[H]e asked me who the black male was that jumped out of my truck and ran off from Mr. Hill's residence."

The Respondent testified that Cook was unsure that the Respondent was a police officer because of his modified duty identification card. Cook returned to his vehicle and one of the other officers approached the Respondent. The Respondent said, "[He] asked me the same thing about, you know, I told him I was a cop and everything."

Cook returned and asked the Respondent if he had been drinking. Cook also asked where the Respondent was coming from. The Respondent informed him he had just left Dave's Dark Horse and that Cook knew where he had been since he had followed the Respondent. The Respondent also added he went to Hill's house to drop him off after dinner. The Respondent testified that approximately 45 minutes had elapsed between the first time he saw the Starkville police cruiser and the time he was stopped.

The Respondent indicated to Cook that he had not been drinking. He stated that Cook then "stopped with the drinking and went back to questioning me about the black male who had run down the street and questioning me about him being in my truck." The

Respondent requested that Cook's supervisor respond to the scene because the black individual had not been in his truck. He explained he had merely seen the black individual running down the road with no knowledge of the individual's identity. Cook indicated to the Respondent that he had seen the black individual get out of the Respondent's truck and run away, which the Respondent insisted did not occur. The Respondent said, "I asked for a supervisor so someone else would be there. The other two officers weren't at the window. It was just myself and Cook." The other two officers remained someplace behind the Respondent's vehicle.

Cook informed the Respondent his supervisor would not come to the scene and indicated that the Respondent should step out of his truck. Cook said that he wanted the Respondent to take a portable breathalyzer test. (PBT) Cook did not state the basis for ordering the Respondent out of his vehicle, and told the Respondent he wanted him to take a PBT test to ensure he was not under the influence. The Respondent complied with the test.

The Respondent stated that Cook administered the test "I think it was four times and he could not get a reading on it. At that point … I asked him and he wouldn't show it to me because there was no reading." The Respondent described the PBT as a "small square electronic device. Like 3 x 3 maybe, a little square box." The tests occurred near the side of the Respondent's vehicle on the driver's side in the street, with another lane of traffic directly to the Respondent's left. The Respondent stated, "A couple of cars might have passed when we were there." The Respondent had never seen a PBT before the test.

When Cook first indicated that he could not get a reading, the Respondent assumed he meant that he had received a reading of zero. The Respondent voluntarily blew into the PBT when Cook asked him. "He asked me to blow into a little plastic tube that's about a inch tube, which I did multiple times." He stated that Cook did not write anything after the first test, nor did he write anything the entire time he was with the Respondent at the scene. Cook subsequently asked the Respondent to blow into the PBT three more times, and after each test the Respondent stated that he "had no reading."

The Respondent asked Cook to show him the reading after the fourth test, but Cook would not show it to him. Cook then placed the PBT back in "his leg pocket." The other two officers waited in front of Cook's vehicle and did not approach the Respondent during the tests.

According to the Respondent, the second police officer who approached him while he was still in his truck did not mention anything about the Respondent being intoxicated, nor did he make any allegations that the Respondent smelled of alcohol. After returning the PBT to his pocket, Cook asked the Respondent to do some standard tests.

Cook first asked the Respondent to complete an "eye test." Cook held out a finger and indicated to the Respondent he should follow his finger moving back and forth using only his eyes. The Respondent completed the test and stated that Cook did not indicate to him whether he passed or failed, nor did Cook have any other conversation with him in addition to explaining the instructions for the test. Cook did not make any kind of documentation while he was administering the test.

Cook then asked the Respondent to perform a "one foot leg raise." They moved to the rear of the Respondent's truck and Cook asked the Respondent to lift one leg off the ground with his arms extended and to balance without touching the ground. The Respondent stated that the other police officers observed this test but did not make any comments. The Respondent did not believe they made any kind of documentation.

The Respondent testified that Cook did not ask him if he had any preexisting medical conditions that would affect his ability to perform the tests, nor did he ask the Respondent if he suffered from sleep deprivation or diabetes. As the Respondent was performing the one leg test, Cook asked him "while you are standing with one leg up and arms out, I think it was by 10's or 20's in reverse from one thousand." Cook did not indicate to the Respondent whether or not he passed or failed, nor did he make any notations.

Cook then asked the Respondent to walk to his police vehicle. As they began walking, Cook instructed the Respondent to walk one foot in front of the other in a straight line. He stated that Cook never indicated to him that he was administering a coordination test and Cook could not use any kind of pavement markings to assist him in administering the test, as there were no pavement markings on that side of the street.

When the Respondent arrived at Cook's vehicle, Cook told the Respondent he would be placed under arrest for driving under the influence. Cook put handcuffs on the Respondent, placed him in the car, and drove him back to the station. Cook never indicated that he stopped the Respondent due to a traffic violation, nor did he explain the basis of the stop.

The Respondent stated that Cook gave his keys to one of the other officers, who proceeded to park his truck across the street in the school parking lot. The Respondent was then transported back to the police station in the back of Cook's vehicle. The other two officers left the scene at the same time as the Respondent, and the Respondent noted that all of the police vehicles were marked. The Respondent did not have any conversation with the other two officers after the initial introduction. Cook did not have any further conversation with the Respondent until they reached the police station.

The Respondent stated that he arrived at the police station after a three to four minute drive. Once they arrived at the station, Cook took the Respondent through a side door into the "breathalyzer (intoxilyzer) room."[4] Also present in the station were "a few officers." When they walked into the intoxilyzer room, Cook asked the Respondent "to blow into the breathalyzer, at which point I refused that and again asked him to talk to his sergeant, at which time he brought the sergeant, the sergeant came in."

The Respondent explained that he refused to blow into the intoxilyzer due to the fact that Cook "got no readings in the street on anything, and he accused me of having a black male jump out of my truck and run off, which was all false already, and at that point I was not going to submit to any more tests until I talked to a supervisor."

The Respondent asked to speak to Ballard in private, and Ballard responded that "anything you need to talk about we can talk about in front of everyone." Ballard asked the Respondent to be honest, and the Respondent "told him what had occurred." The Respondent asked Ballard "what can be done at this point" and Ballard told the Respondent "he could not override his officer's call."

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[4] The Respondent refers to the intoxilyzer room as the "breathalyzer room." It should be noted that Cook refers to this room as the "Intoxilyzer room" and for purposes of consistency the room will be referred to as the "intoxilyzer room" unless there is a direct quote from the Respondent.

When the Respondent told Ballard everything that occurred in the street, Ballard did not ask any question about why his police officers initially stopped the Respondent; nor did he inquire about the use of the PBT. After the Respondent explained what occurred he stated that Ballard told him that he could not tell his officer to "unarrest" him.

The Respondent, Ballard and Cook returned to the intoxilyzer room, at which point Ballard "finished the printout from the breathalyzer, and he signed off that I refused on it, and then I had to sign a couple of pieces of paper" and he was then transported to the county jail by Cook. Cook did not make any notes about their conversations while they were in the station, merely made an entry on the intoxilyzer that the Respondent refused to take the test. Ballard also did not make any notes on their conversations. The Respondent did not have any conversation with Cook on his trip to the county jail, which only took a "few minutes."

The Respondent stayed in the county jail for approximately two hours. He was processed upon his arrival and informed that he must post a $1,000 bail in order to be released the next morning. The Respondent asked if an officer could retrieve some money he had left in his vehicle, as he did not want the money left on the street. The jail personnel contacted Cook who retrieved the money from the Respondent's vehicle and brought it to him so that he could post bail.

After being in the jail for two hours, Ballard got the Respondent out of his cell and retrieved his property from the Corrections Department. Ballard took the Respondent back to the police station where the Respondent signed papers indicating he would appear in court in January. Ballard and the Respondent then returned to Ballard's

vehicle, whereupon he was transported back to his hotel. Ballard returned all of the Respondent's property and released him.

The Respondent later traveled back to Starkville in order to appear at Starkville City Court. He explained that his date for January had been postponed and rescheduled for the middle of the summer and that his trial was a bench trial. Cook testified at the trial, and the Respondent gave the Court a summary of his testimony.

The Respondent then testified as to the testimony Cook gave at that Bench Trial. He stated that Cook testified that he followed the Respondent out of Dave's Dark Horse and to the apartment complex, where he noticed that Hill was in the Respondent's vehicle. Cook then followed the Respondent to Hill's residence. The Respondent further stated that Cook testified that he witnessed a black male individual get out of the Respondent's truck and run off. Cook then drove his vehicle past Hill's residence to a church on the corner of Critz Street and Jackson Street where he observed the Respondent for the 10 to 15 minutes he was there. The Respondent said Cook also testified to alerting Cohen that a suspicious truck with New York plates was in the area.

The Respondent stated that Cook testified that the Respondent left Hill's residence and pulled onto Jackson Street. Cook then followed the Respondent to another restaurant, Rosy Baby's, and continued to follow the Respondent into the parking lot. The Respondent said, "[Cook] testified that I pulled out of Rosy Baby's from the rear of the parking lot, and as I came over the hill, he had pulled me over with other officers. I don't believe he testified how many." Cook stated that he and the other officers stopped the Respondent in the street and proceeded to question him on the identity of the black individual. Cook also testified that he administered a PBT "and there was no readings on

it given." The Respondent stated Cook also mentioned the field sobriety tests of the "eye test," one legged stand, and straight line test in Starkville City Court. Cook then said he placed the Respondent under arrest and transported him to the police station, where the Respondent refused to take the intoxilyzer test.

During the Bench trial at the City Court, Cook testified that he stopped the Respondent because he was in "a suspicious vehicle." The Respondent further explained that Cook did not say he stopped the Respondent for any other reason besides the fact that he drove a suspicious vehicle. Cook did not testify regarding how many times the Respondent took the PBT test and only stated that he could get no readings from the test. The Respondent stated that Cook did not mention that the Respondent blew a .11 on the PBT in the Starkville City Court.

The Respondent also testified that Ballard and Cohen testified during his first trial. The Respondent also gave a summary of Ballard's testimony to the Court. He stated that Ballard testified that he was requested to go to the location where Cook pulled the Respondent over, a request to which Ballard did not comply. Ballard testified that he spoke to the Respondent when he arrived at the police station, but refused to speak with the Respondent in private. Ballard testified he could not override the arrest of the Respondent; the decision to arrest him had been made at the discretion of Cook. Ballard also testified he picked up the Respondent at the jail and had him sign the documentation to appear in court back at the police station. The Respondent added that Ballard had previously mentioned the fact that Cook was attempting to make 200 arrests for driving while intoxicated that year and had not yet reached his goal at the time of the Respondent's arrest.

According to the Respondent, Ballard also testified that the Respondent told him that he drank a "six pack" and that he had taken shots of alcohol in the bar. Cook did not testify that the Respondent had been drinking, but stated that he had been in the same room when the Respondent informed Ballard on the specifics of the alcohol he consumed that night.

When asked if Cook provided the court with any documentation regarding the field sobriety tests, the Respondent stated, "[T]he only report was on the arrest report that he filled out that said...my driving was fine, I wasn't stumbling, my coordination was fine, which I believe there is a copy of here. There was no DWI checklist report done, just the standard arrest report."

The Respondent also gave a summary of Cohen's testimony. He stated that Cohen testified that Cook informed him of a suspicious vehicle in the area and gave a description of the Respondent's vehicle. Cohen also testified that he drove past the Respondent at Hill's residence. Cohen then testified that he parked in the church lot at Jackson Street and Critz Street, and that Cook was parked elsewhere. Cohen also testified that he saw the black male run down the street and that the black male was not in the Respondent's vehicle, nor did he see the individual anyplace near the Respondent's truck. Cohen stated that he was following close behind the Respondent as the Respondent went into the parking lot of Rosey Baby's. As soon as the Respondent pulled into the parking lot, Cohen testified that Cook instructed him to "light [the Respondent] up," meaning to pull the Respondent over as soon as he left the parking lot.

Upon questioning by the Court regarding whether or not the Respondent had any written records of the Starkville officer's testimony, the Respondent indicated that his

attorney was "taking all the notes and stuff," and that his attorney had a copy of these notes. The Respondent added that as far as his memory of the officer's testimony he "was in the trial room. I remember his words exactly" and he regularly refreshed his memory from the notes by "going through it with my attorneys over the phone and things."

The Respondent testified that he was found guilty after the trial at the Starkville City Court and he appealed his conviction to the next higher venue, the Oktibbeha County Criminal Court. The basis for this appeal was based upon the Respondent and his attorney's belief that his arrest was the subject of an "illegal car stop." He also indicated that the "evidence the officers provided was quite different than what actually occurred, and that's where we went from there." The appeal resulted in a new bench trial, where testimony was heard a second time and all three Starkville officers testified again. The Respondent indicated that the testimony given by the officers at the appeal was "pretty much the same as what it was at the city level." The PBT testing was never discussed or questioned by any of the officers. Two weeks later, the Respondent ascertained that the Judge in the County Criminal Court directed a not guilty verdict.[5]

With respect to Disciplinary Case 82607/07, the Respondent testified that on January 24, 2007, he was directed by a lieutenant "in the building"[6] to report to the Counseling Services Unit, as "part of the process with the DWI arrest." Upon reporting to the Counseling Services Unit, the Respondent spoke with Sergeant Sweeney who

[5] Under the ORDER OF EXPUNGEMENT issued by the Starkville Municipal Court it states in relevant part: The Court finds that there was one charge preferred against him (Respondent). The Petitioner was granted a Directed Verdict of Acquittal on appeal with the Oktibbeha Circuit Court on October 16, 2007 in Cause Number, 2007-0167. (RXA)

[6] The Respondent used this terminology to refer to One Police Plaza.

informed him that he "had to attend their counseling unit program sending me with their contract with a whole list of requirements. We went through it together, told me I had to sign it. I asked him about it being voluntary contract. He said I am ordered to sign it and follow through with it, at which time I signed the contract and underneath signed it under duress by me. At that point, he tore the contract up gave me another one, and I signed it again under duress. He told me I can't sign it under duress." While Sweeney informed the Respondent that he could not sign the contract under duress, the Respondent stated that he did not explain why.

The Respondent stated that he was directed to report to the Medical Division when he signed a third subsequent contract "under duress." Upon arrival at the Medical Division, the Respondent met with Inspector Holloran. The two discussed the counseling program requirements and the Respondent informed him, "...I have no problems signing it. I signed it under duress. He ordered me to go back to the counseling unit and sign the contract." The following day, the Respondent went back to the Counseling Unit and met with Sweeney where he signed another contract and again signed it "under duress," which was thrown out. This process was repeated three times, when the Respondent was ordered back to the Medical Division. There, Holloran took the Respondent's ID card and suspended him.

Regarding Disciplinary Case 83275/07, the Respondent acknowledged that he is familiar with the Niemanns. Particularly, he was dating Danielle Niemann for "approximately two to three years" and that he has "known them for a while." In the time in which the Respondent was dating Danielle, she was married but separated from

Scott Niemann, and he was not living with her at the time. The Respondent detailed his relationship with the two:

> Over that time period, I was there [the Niemann's house] all the time we have been there, talked to Scott in the house, Mr. Niemann. Talked to him in the house. I watched their son at times. When no one was around, I watched their dogs. I helped Danielle take care of the yard at times. She had given me a key to the house. A couple of times they had taken their son on vacation and I had keys to go take care of the dogs.

The Respondent said he called Danielle on the telephone and spoke with her "multiple times a day." He would use either a landline or a cell phone to call her, and that he regularly received multiple telephone calls from Danielle as well. The Respondent testified that there came a point in October of 2006 when he came home from work early one evening, went to Danielle's home and discovered her laying on the floor with what he "assume[d] would be a crack cocaine pipe." The Respondent telephoned her parents, in addition to Scott, for the purpose of getting her help. This was not received well by Danielle and she informed the Respondent that "...she felt I betrayed her, and she then informed me she was going to call my job, do anything she had to do to get my job ended, to get me fired."

The Respondent prepared a "49" to Lieutenant Anderson, the Integrity Control Officer of his command at the time, the 47th Precinct, reporting what had occurred and the fact that Danielle had threatened his employment. (RXB) He provided the 49 to the ICO and the Assistant ICO, who informed him to cease any communication with her, and to voucher his off-duty firearm so as to prevent any allegations regarding guns. The Respondent testified that he received a few calls from Danielle, including one the

day before of his Official Department Interview related to the Niemann complaint to the Department.

The Respondent testified that during the course of his conversations with Danielle, they discussed various subjects. With respect to the telephone calls made to Scott, the Respondent stated that Scott asked him to do things such as "put down sod in the yard...favors like that for him" and that later communications concerned trying to find help for Danielle after observing her with a crack pipe.

On cross-examination, the Respondent stated that Officer Cook approached his vehicle at night, on December 12. He indicated that the weather conditions were dry and that he did not recall if it had rained that day. The area was dimly lit with few lights present. The Respondent acknowledged that the police officer's vehicle was pointed in the same direction as his vehicle, with his headlights on, and that there was another police vehicle present with the headlights also illuminated.

The Respondent did not agree that bloodshot eyes were a symptom of someone who had been consuming alcohol, but later conceded that it could be indicative of such. He similarly disagreed that the odor of alcoholic beverages on someone's breath was an indication they had been drinking. He stated that the odor of alcohol could be "from multiple things." The Respondent acknowledged that he performed a variety of field sobriety tests on the evening of his arrest and that a PBT was administered several times. He stated that he did not see the reading displayed on the screen of the PBT and only knew that the reading was zero because "the officer told me it was zero multiple times, that's why he had to keep giving it."

The Respondent did not recall the instructions pertaining to the one-legged stand test, but did recall how he performed on this test. He did not recall putting his foot down prior to the expiration of thirty seconds and stated that he kept his foot raised for "as long as I possibly could." He did not know for how long because he was unable to see the officer's watch. He also did recall counting backwards during the one-legged stand test, and acknowledged his hands were raised with one foot above the ground. The Respondent further explained that during the test "I think he had me both palms up, arms out and stand. I think, like you said, he made me count backwards."

During his career with this Department, the Respondent has been assigned to patrol duties. As such he has not received any training in field sobriety tests and he has not made any alcohol related arrests.

He acknowledged that he understood all of the officer's instructions for performing the field sobriety tests and that he tried his best to comply with them. He did not inform the officer of any physical problems that would inhibit his performance of these tests. Relative to the walk and turn test, the Respondent explained that he was told "walk to his [Cook's] patrol car, and that was the walk and turn. He said walk in a straight line to the patrol car." He did not recall being given a direction to walk heel to toe, or being told to make a turn at the end of several steps. The field sobriety tests were conducted in between Cook's patrol vehicle and the Respondent's car, in the street which was made of asphalt. The pavement contained markings and the Respondent indicated that he was not asked to use the markings as a guide for the walk and turn test. He did not recall raising his hands during this test, and stated he walked "normally in a straight line." The Respondent said that when Cook initially approached

his vehicle, he was "a few feet away" from him, that his window was down and that the two were face-to-face when he spoke to Cook.

The Respondent said that he first observed a police vehicle following him when he left the restaurant parking lot and proceeded to travel on "82." He indicated that "whatever road it was, there was a police car across the street pulled out right behind me." He explained that he had dinner at the restaurant and was there for about 45 minutes to an hour and that he did not consume any alcoholic beverages with dinner or that day. He recalled the name of the restaurant was "Dave's Dark Horse" and that it had a bar and a full restaurant and acknowledged that alcohol was served there. He arrived at the restaurant by himself, and planned to have dinner there in addition to picking an individual up who needed a ride home. The Respondent identified this individual as Tracy Hill, whom he had met at the University of Mississippi when he was a student there. He denied any knowledge with respect to Hill's criminal history.

The Respondent stated that he graduated from the University of Mississippi with a Master of Science degree in forest products. He elaborated that forest products encompasses wood. He acknowledged that when he attended the university, there were students present who were not from Mississippi and that he too was not from that state. The Respondent stated that he assumed that students at the university go to Starkville to have dinner, party or have entertainment.

He acknowledged that he left Dave's Dark Horse ("Dave's") with Hill who he believed drank beer with dinner. While he sat near Hill at dinner, he did not take notice of how many drinks he had consumed and did not know if Hill was intoxicated. The Respondent stated that he had known Hill for approximately two years from the

University, and was friends with him. The Respondent agreed that there came a point where he and Hill got into his vehicle and left the parking lot of Dave's and subsequently noticed a Starkville Police vehicle behind him.

The Respondent testified that he "proceeded through the next intersection, made a right hand turn onto I believe it was Montgomery Street, and then I pulled into the apartment complex to talk on the cell phone, made some phone calls." He stated that the police car followed him when he turned onto Montgomery Street but that it did not follow him into the parking lot of the apartment complex. The lighting in the parking lot was "kind of dark in the back" and there was a street light present at the entrance. He did not recall using his dome light inside his vehicle when he stopped in the lot. The Respondent was not a resident of the apartment complex, and he indicated that upon pulling into the lot, he did not step from his vehicle and remained seated inside for "10 minutes approximately." He had no recollection with respect to turning his car off, headlights off, or how many telephone calls he made. He did state that he was returning calls because "multiple" people called him although he did not recall who. He agreed that his cellular phone number is (845) 988-1181, but indicated that it is registered to his mother, Dorothy Ehlers. The Respondent stated, "we had multiple phones we use," denying that that particular telephone number was for his exclusive use. Referring to the cellular phones, he stated, "My mother owns four phones. Whoever uses that one at the time. I have used my brothers' phones. They use mine. Whoever takes the phone. They are all the same. If you grab a different phone, you grab a different phone." While they were all the same model phone, the numbers differed.

Subsequent to leaving the apartment complex parking lot, the Respondent indicated that the police car began following him again. He proceeded to Hill's house. He never noticed the odor of an alcoholic beverage in his vehicle while with Hill. Upon arrival at Hill's house, the Respondent stated that there was no one present or standing outside. At a later point, he stated there was one person standing outside. The patrol vehicle continued to travel down the street, and it did not display any lights or sound its siren and the Respondent was unable to see the officer in the car. The Respondent exited his vehicle at Hill's house and was there for approximately ten minutes. In that time, a Starkville Police vehicle passed the house. The Respondent later got into his vehicle alone and left Hill's house.

The Respondent got back onto the street, and did not notice any odors of alcohol in his car. He headed toward the Holiday Inn, where he was a guest. He indicated that he approached an intersection where there was a church and then made a turn. After making the turn, the Respondent noticed that a patrol car was behind him again. He did not know where this car came from and saw it in his rearview mirror. No lights or sirens were being used and no direction was issued to pull over. The Respondent acknowledged that the patrol vehicle did not pull in front of him and force him to the side of the road.

The Respondent indicated the time was now about 12:30 am, and he pulled into a parking lot of a closed establishment to "see what the officer wanted that was following me." He stated that the officer "slowed down real slow in front, watched me, and proceeded up the hill." The officer did not pull into the lot after the Respondent.

The Respondent subsequently turned his car around inside of the lot and pulled back onto the street, making a right turn.

The Respondent testified that as he proceeded back in the same direction, from the closed restaurant parking lot, he came over the next hill and saw a police car parked near a bus entrance for a school. He explained, "As I crested the hill, he turned on his lights and pull out behind [me]." The Respondent explained that upon leaving the closed restaurant parking lot, he proceeded in the same direction that the police vehicle traveled in as it passed him in the lot and that this was the direction towards the Holiday Inn. As the police car got behind him, the Respondent indicated that he stopped in the lane of travel because "there is no place to go." He acknowledged that one lane of the road travels in one direction, and the opposing lane travels in the other, adding that "the sidewalk and the curb are right next to the lane of traffic. When he got behind me, I stopped right there."

The Respondent said that the officer got out of his car and that he had a professional demeanor in asking him some preliminary questions. "First he questioned me about a black male he had seen running from my truck...." The officer asked if the Respondent had consumed alcohol, to which he replied he "had not."

At some point during the encounter, he was asked to submit to a PBT test and some field sobriety tests and ultimately he was arrested. The Respondent acknowledged that he requested the officer's supervisor prior to the field sobriety tests. Upon being placed into the officer's patrol vehicle, the Respondent acknowledged that he was handcuffed and transported to the police station.

Upon arrival at the police station, the Respondent continued to ask for a supervisor. The Respondent went into a room with Officer Cook and that the door to this room was open and was never closed. In order to enter this room, you had to pass through a "common room" in which the Respondent indicated other officers were present. This inner room was where the breathalyzer tests were conducted and he acknowledged that the officer read him statements relative to refusing to submit to the breathalyzer test. He agreed that he was informed that refusing to take the test would have an affect on his privilege to drive, and further agreed that he was asked to submit to the test and refused to do so. When asked to explain his refusal, the Respondent testified:

> Because at this point, the officer was accusing me of being in my vehicle with a black male who was unknown to me, told me I was there. He was a known robbery recidivist and a drug dealer. I told the officer the individual, I believe his name was Jamante Thomas, was not in my truck. I seen him running down the street, and he still continued to say that the guy got out of your truck. I had no more trust in the officer at that point. I tried to explain what was going on. In addition to that, the PBT test, the portable breath test, he gave that to me multiple times with no readings. At that time, I felt the officer was not being professional in what he was doing, and I was no longer going to follow what his directions were.

The Respondent agreed that he was refusing to submit to the test because he was being wrongfully accused of associating with someone, combined with the fact that the results from the PBT test "were zero. He said he could not get a reading."

The Respondent was asked by the Court to provide a summary of why he refused the test. He stated, "They followed me for multiple—I don't know, whatever time period was they followed me. An extended period of time they followed me from location to location for unknown reasons. No problem. I stopped, they didn't want to

talk to me. They kept going. Pulled out, accused me of being with a drug dealer. There was no reason for them stopping me in the street. They stopped me in the street. I told him about the drug dealer in the street, that I seen him run from the location...I had no idea who it was. I've never seen him...He had no reason to stop me in the street, he was accusing me of being with that gentleman, the portable breathalyzer he got no readings on. You can read any manufacturer on it, you have to reset that. You can't just keep reusing it. It screws up the whole test with any breathalyzer.... I felt I was unfairly treated at that point and was not going to go further with any of his testing."

He stated that Ballard was present in the testing room, and arrived before he was given the warnings and asked to submit to the test. He stated that Ballard "was in the doorway right there" when he refused to take the breathalyzer test. The Respondent stated that he did not ask Ballard or an alternative officer to administer the test as opposed to Cook. Ballard essentially informed the Respondent that he could not "unarrest" him.

Upon arrival back in New York, the Respondent acknowledged that he was directed to go to the Medical Division. During a meeting with Sweeney, the Respondent testified that he was ordered to attend an outpatient counseling program. He testified that, "He gave me the contract, he ordered me to sign the contract. I signed it under duress because they wanted me to sign it as voluntarily. It was not voluntary. I was being ordered. They weren't paying me for that time after my eight and a half hour shift, so that's why I signed it under duress." The Respondent acknowledged that he was not being threatened in any way with arrest or bodily harm if he did not sign the

contract. Rather, he stated that Sweeney informed him he would be suspended if he failed to sign the paper, so, he signed it under duress. He acknowledged that this was a job-related duress in that "they were ordering me to go somewhere on a voluntary basis on my own time."

After signing the contract "under duress that [he] was going," the Respondent was directed to see Holloran. Holloran informed him that failure to sign the contract would result in suspension and he directed him back to Sweeney to sign the document. The Respondent stated, "I went back, and I signed the contract again under duress…I signed my name Eric Ehlers under duress." He stated that Sweeney ripped up the document and threw it out, informing him that they would not accept it under duress. He stated that this process was repeated three or four times—signing the document under duress, and Sweeney ripping it up and throwing it out. He signed it under duress each time and was ultimately ordered back to Halloran.

Upon arrival back at Holloran's office, the Respondent said he tried to explain to no avail. He was then suspended by Holloran. He explained that the aforementioned events did not transpire in the course of one day. The first time he spoke with Halloran was the end of the day and he was directed back to Sweeney for the second instance the following day and then back to Holloran's office again. He indicated that on the second instance in Holloran's office, Holloran was not interested in talking and simply suspended him. The Respondent acknowledged that he was not threatened with bodily harm or arrest by Holloran.

Regarding the charges relating to the harassing telephone calls, the Respondent indicated that the male and female involved were separated but not legally divorced.

They were not living in the same residence. He explained he had watched the couple's dogs and their child in the past and also had keys to their house. He admitted that he was dating and having a sexual relationship with the female, Danielle Niemann.

The Respondent acknowledged that at one point, he saw Danielle passed out on the floor of her residence with what he suspected to be a crack pipe adjacent to her body. He did not call the police or seek medical attention and he left the house, offering that he assumed that other people were in the house because of the presence of vehicles in the driveway that he did not recognize. He assumed other people were in the house. He may have called Scott Niemann to report his observation.

The observation of Danielle's drug usage was made in October of 2006. The Respondent indicated that subsequent to his observation of her on the floor the two were still in contact. He indicated that she telephoned him "on the level of getting her help. The relationship was over." After his observation of Danielle's drug use, he informed her that he was terminating the relationship. The Respondent stated that Danielle became aggravated because he reported her drug use to her family and she then threatened negative action against his employment with the Department.

The Respondent acknowledged writing a 49 to the Integrity Control Officer of the 47 Precinct on October 23, 2006, stating that Danielle had threatened his employment. He was told by the ICO not to have any further contact with her. He could not recall if Danielle contacted him before or after the 49 was written. He did not recall making telephone calls to her after October 23, but stated he may have, but indicated he spoke with her multiple times prior to October 23 for the purpose of

assisting her in getting help for her drug problem. The Respondent stated that his mother, Dorothy Ehlers, also spoke to Danielle.

The Respondent admitted to making a log of the times that Danielle called him between November 2006 and April 2007 and acknowledged that it showed 13 incoming phone calls. He testified that on November 29, he was told to change his telephone number because Danielle was still telephoning him. He assumed that Danielle was told by the Department not to call him, because he indicated that she had been in contact with the Department. He also stated that at 2:51a.m., on November 29, 2006, he informed Danielle not to continue to call him. This was the first time he told her and he stated that she continued to call him..

Upon inquiry from the Court, the Respondent acknowledged that Danielle had called him between October 23 and November 29, 2006 and that he answered the phone and had conversations with her.

The Respondent was "not positive" if he called Danielle between October 23 and November 31, 2006, but agreed that the purpose of speaking to her would have been to assist her in obtaining help. He indicated that she was receptive to getting help. The Respondent was asked about 525 calls made to Danielle between October 1 and November 31, 2006. Asked if the first 100 of these calls were not sufficient in getting her help, the Respondent stated, "Some of those calls if there is no service there is 0001. It's just a number being dialed. It's just a number being dialed. Like if you have no service on your phone, no one gets talked to." He conceded to making 500 telephone calls.

Regarding the telephone calls made to Danielle, the Court asked the Respondent if it was fair to say that he sometimes reached her on the telephone. He replied, "Probably the majority of them were just dropped calls or whatever," and stated that he spoke with her "a few times..." Asked to elaborate, the Respondent further testified that, "Maybe a quarter of the time I actually spoke to her. I am just assuming. Her phone is off a lot." He guessed that maybe he spoke with Danielle 175 times, and then stated "Maybe a hundred times. I am just guessing. Her nature her phone is off a lot." Confronted with the statement that 500 calls "is a lot of calls...even if it was for altruistic reasons" the Respondent replied, "I make thousands of calls to people in a month."

On re-direct examination regarding the DUI arrest, the Respondent testified that Cook never explained why he stopped him and that he was only concerned with who the black male was that ran from his truck. He was not accused of committing any traffic infractions. He testified that at the lower court proceeding, Cook did not mention any traffic infraction and that he did not mention it at the appeal trial either. With respect to the field sobriety tests, the Respondent stated that Cook did not make any notes and had no papers in his hand.

Regarding the refusal of the order to attend outpatient treatment, the Respondent testified again that he did not refuse to attend the program and that he did not refuse any orders from Sweeney or Holloran.

The Respondent testified that the telephone calls that were placed to the Niemann's were for the purpose of getting help for Danielle for her drug problem.

Trial Record From The Circuit Court Of Oktibbeha County, Mississippi

The Respondent, during his testimony, indicated that Cook testified differently during the appeals hearing in the Circuit Court of Oktibbeha County in Mississippi. On October 9, 2008, this Court reopened the Respondent's trial for the purpose of receiving into evidence the transcript of that hearing offered by the Respondent. While the Respondent was not present at this conference his attorney made it clear to the Court that the transcript was coming from the Respondent, that he was aware of its contents and that his appearance was unambiguously waived by his counsel.

After some discussion it was agreed that the entire transcript would not be admitted into evidence: specifically testimony from any witnesses that did not testify at this trial, the judges comments and rulings and the closing arguments made by the attorneys. In addition certain portions of Ballard's testimony were redacted because that same testimony was not elicited from him while he was testifying at this proceeding.

After reviewing the transcript of the Mississippi hearing this Court found that Officer Cook's testimony at that proceeding was consistent with the testimony that he gave at this Departmental trial. In both proceedings he recounted how he saw the Respondent leave the Dark Horse bar and park in the apartment complex parking lot. He spoke of the Respondent leaving that parking lot and going to Hill's home and standing outside of the home. He stated that he saw the black man leave the area of the Respondent's truck, the Respondent driving away and then stopping at another parking lot of a closed restaurant. He further testified of how the Respondent stopped in the middle of the road and Cook approaching the vehicle and smelling the odor of alcohol

coming from the Respondent and his admissions to having drinks. Cook also consistently testified as to the field tests he administered to the Respondent and their results. (RXA)

The only difference in Cook's testimony was his account of the PBT test. At the appeals hearing he testified that the Respondent refused to take that test on the roadway and gave no further testimony as to the test he actually gave and the .11 results. It should be noted that he was not cross-examined by the defense counsel about administering that test and its results. Cook did state, however, under cross-examination at the Department trial that the PBT is not admissible and therefore this Court can only conclude that that was the reason it was not brought out in the appeals hearing.

Ballard's testimony during the appeals hearing was equally consistent with his testimony at the Department trial: there he pointed out that the Respondent asked to see him at the police station and how he smelled alcohol on the Respondent's breath. He testified that when he asked him if he had been drinking the Respondent first denied having anything to drink and then admitted to drinking beer and a shot of alcohol. He also spoke of the Respondent's bloodshot eyes and where he told the Respondent that it was Cook's decision to arrest him and he would stand behind his arrest. It should be noted that much of Ballard's testimony was redacted from the transcript because, according to the attorneys in this case, it involved testimony not given at this trial.

FINDINGS AND ANALYSIS

Disciplinary Case 82583/077

Specification Nos. 1, 2, & 3

The Respondent is charged with three specifications arising from his arrest in Starkville, Mississippi. Under Specification 1, he is charged with operating a motor vehicle while intoxicated; under Specification 2, he is charged with operating a motor vehicle while impaired and under Specification 3, he is charged with refusing to submit to a Breathalyzer test after being arrested.

This Court heard testimony from Police Officer Cook and Sergeant Ballard, both of the Starkville, Mississippi Police Department. Cook, a DUI enforcement officer with many arrests for DUI, credibly testified in detail how on December 12, 2006, he observed the Respondent driving a pickup truck. Cook saw the Respondent leave the Dark Horse bar and watched him drive into and park his vehicle in the parking lot of an apartment complex located one block from the bar. Cook also saw that the Respondent had a passenger in the front seat of his vehicle, Hill, who had previously been arrested several times by the Starkville Police.

After remaining in the parking lot for a brief period, the Respondent then drove to Hill's house, which the Starkville Police had responded to in the past, and was observed by Cook outside of his truck with Hill and also a black male. Cook said the black male walked away from the Respondent's truck. Cook then drove past the house and lost sight of the truck. At this point this Court is mindful of the fact that the Respondent was aware that the police were observing him because he observed a patrol car driving slowly by him on more than one occasion.

[7] The Specifications are addressed here in the order in which they appear in the charges.

Approximately five minutes later, Cook again saw the Respondent driving his truck into another parking lot where a closed restaurant was located, then exited the parking lot and "just stopped in the middle of the road" without any prompting from Cook. Cook noted that he did not activate his lights or give him an order to stop. According to Cook, the Respondent's action of stopping in the middle of the road caused a full obstruction of the lane of travel as it was only a two lane roadway—one lane in each direction. Cook then stopped behind the Respondent, activated his lights and approached his car. When he reached the driver's side of the vehicle, the Respondent told him that he stopped in the middle of the road because "he knew he was going to get pulled over anyway."

While Cook was standing on the driver's side of the vehicle, Cook smelled the odor of alcohol "coming from his breath" as he stood about an "arms reach" away from the Respondent. When he first asked the Respondent if he had been drinking the Respondent told him that he had not. Cook asked him again if he was drinking, and the Respondent admitted to having a "couple of drinks." Based upon his observation of the Respondent and his admission that he was drinking, Cook asked the Respondent to step out of the vehicle and had the Respondent perform a number field sobriety tests.

Cook administered to the Respondent a portable breath test ("PBT"), and the device registered a reading of .11. The legal limit in the State of Mississippi is .08.[8] Cook then administered three separate field sobriety tests, the Horizontal Gaze Nystagmus ("HGN"), the one leg stand test, and the walk and turn test.

During the HGN or the "involuntary jerking of the eyes" test, the Respondent was unable to follow Cook's finger with his eyes as the test requires. Instead, the

[8] New York State also has a legal limit of .08.

Respondent's eyes "would twitch, trying to go back"— a "clue" indicating the presence of alcohol.

During the one leg stand test, the Respondent was unable to stand on one leg for a thirty second period, as the test requires, and "dropped his foot and raised his arms for balance." The last test administered required the Respondent to walk heel-to-toe on a straight line and Cook's observation of the Respondent during this test showed that he raised his arms for balance and "spun around on one foot" without making a turn, as required.

Based upon the results of these three tests, Cook's observations, and the Respondent admitting he had been drinking, Cook concluded that the Respondent was intoxicated and placed him under arrest. Cook then brought him to the Starkville Police station.

Upon arrival at the police station, the Respondent asked to speak with Cook's supervisor, Ballard. Ballard credibly testified that he smelled an odor of alcohol and concluded that it came from the Respondent. When Ballard spoke with him in the arrest processing room the Respondent expressed concern about his employment with the Department. The Respondent told him that he drank a "six pack" earlier, and also had a "triple shot" at the Dark Horse. He asked Ballard for a "professional courtesy" and Ballard informed him that he could not "un-arrest him."

It is uncontested that while at the Starkville Police station the Respondent was asked to submit to a Breathalyzer test inside of the arrest processing room. It is also uncontested by his own admission that he refused take part in this test.

In contrast to Cook's and Ballard's testimony, the Respondent testified that he went to the Dark Horse to eat dinner and pick up a friend he knew from college, Hill, and gave him a ride home. He said that Hill was probably drinking beer with dinner and he did not know if Hill was intoxicated.

When they left the Dark Horse he drove into an apartment complex parking lot that he admitted he had no business being at other than finding it necessary at that point to talk on his cell phone. He then proceeded to drive to Hill's house. When he arrived there he said an unknown black male ran passed his truck, on the sidewalk. Upon leaving the house he then pulled into the parking lot of a closed restaurant because he believed that the police were following him and he wanted to see if they wanted to speak with him.

The Respondent then left that parking lot and claimed that a short distance later he was stopped by three Starkville police cars. He denied that he voluntarily stopped his vehicle testifying that Cook used his flashing lights to pull him over and that he stopped in the middle of the road "because I was in the right-hand lane because there is a curb and the sidewalk, so there is no place to get out of the roadway, so I was parked in the roadway." The Respondent testified that he told Cook that he had not been drinking and claimed that he was administered the PBT test several times, and that Cook failed to obtain readings on each occasion.

At one point during his testimony the Respondent indicated that Cook's testimony at this proceeding was different than at his DUI appeal hearing in Mississippi. This Court reviewed the minutes from that proceeding (RXA) and found Cook's testimony to be consistent with his testimony at this Department trial. The only difference in his

testimony was his not introducing the results of the PBT test which he testified at this proceeding was not admissible in Mississippi.

This Court does not find that the Respondent operated his motor vehicle while in an intoxicated condition, but finds him guilty of being impaired by alcohol because the evidence presented supports the lesser charge. In People v. Cruz, 48 N.Y.2d 419 (1979) the Court defined intoxicated and impaired conditions as "Intoxication is a greater degree of impairment which is reached when a driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." The Court further defined an impaired condition as when the driver "by voluntarily consuming alcohol...has actually impaired, *to any extent*, (emphasis added) the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver."

Cook's (and Ballard's) description of the Respondent having an odor of alcohol on his breath; the Respondent failing the field sobriety tests and his own admissions that he had been drinking is strong evidence that his physical and mental abilities were impaired "to any extent" as defined by Cruz. To be found guilty of intoxication, however, this Court would need a more definitive and reliable number to show that a test showed that the Respondent had at least a .08 reading for alcohol in his system. While Cook credibly testified that the PBT test registered a .11 in the field, this Court has no way of knowing the accuracy of that test for the purpose of showing intoxication. It certainly serves as probable cause to make an arrest, but then a more accurate breathalyzer test should be administered for more reliable numbers to indicate

intoxication. Cook was prepared to administer a breathalyzer test but the Respondent refused—a refusal that gives this Court a strong indication that he feared that the results of the test would have indicated a level of intoxication. This Court was not persuaded by the Respondent insisting that he refused the breathalyzer test because he no longer trusted Cook. The Respondent is a police officer and he knows that he is required to submit to such a test. And if he failed to remember the requirements of taking the test he was certainly reminded of them at the time of his arrest.

Moreover, had Cook's description of the Respondent included him driving erratically all over the road and/or barely able to stand and falling down during the sobriety tests then this Court might have a different view towards a finding of intoxication.

Furthermore in the opinion of this Court, the Respondent's version of the events is not persuasive in light of the facts presented in this case. With regard to the Respondent stopping his vehicle in the roadway, this Court finds that Cook had every reason to approach the Respondent's vehicle. This determination does not rely solely upon his driving through the streets of Starkville and stopping at various locations. Nor does this Court view the presence of Hill and the unidentified individual running from the vehicle as the sole determination for Cook's approach to the Respondent. Rather, the Respondent was the one who initiated the stop of his vehicle and by stopping at the location that Cook testified to, one direction of the roadway was essentially blocked by the Respondent's truck. At that point, Cook had every right to approach the Respondent and conduct an inquiry. If Cook intended to physically stop the Respondent he could have done it long before the Respondent stopped in the roadway.

The Respondent and his attorney continued to maintain throughout this trial that he was the victim of an unlawful car stop and that Cook stopped him without just cause. Even if this Court was to credit the Respondent's version of how he was stopped, it would not automatically preclude the fruits of the stop and the Respondent's arrest from being acceptable in this forum.

In the matter of *Boyd v. Constantine*, 81 N.Y.2d 189 (1993), the applicability of the exclusionary rule was explored with respect to administrative disciplinary proceedings. In that case, the Court of Appeals considered the issue of the New York State Trooper who was terminated from his position after he was charged with marijuana possession, a charge that was dismissed when it was determined that the evidence against him was obtained unlawfully. The evidence in that case consisted of two Buffalo City police officers who observed the Trooper and another man in the back seat of a parked car in a parking lot. The officers ordered the men out of the car and searched the vehicle. They found marijuana in the vehicle and the Trooper told the officers that the drugs belonged to his girlfriend and asked them to give him a break. The Officers issued him a summons charging him with unlawful possession of marijuana. The Trooper's superiors were advised of the charge; he was tried administratively and terminated from his job.

The Court found that "nothing in the record indicates that the Buffalo City Police were acting as agents of the Division of State Police. Thus, it cannot be said that the Division of State Police, in seeking to discipline petitioner for unlawful possession of marijuana, relied upon the unlawful and unconstitutional acts of its agents." The Court therefore concluded "that the evidence by the Buffalo City police officers should have been admitted in the State Police's administrative proceeding. The Buffalo City Police

could not have foreseen, when they searched the vehicle, that defendant would be subject to an administrative disciplinary proceeding by the Division of State Police.

Therefore while improperly obtained, the evidence could still be admitted in an administrative disciplinary proceeding because of the fact that the Buffalo Police Department, who seized the evidence, were not acting on behalf of the New York State Police, Boyd's employer.

The same principle can be applied here. Neither Cook nor the Starkville Police were acting on behalf of this Department, nor could they possibly have foreseen that the Respondent would be the subject of an administrative proceeding in this forum when Cook first approached the Respondent's vehicle or even when they detained him at the police station. Rather, Cook was performing his duties as a police officer for the purpose of enforcing the laws of Mississippi.

In the final analysis, however, this Court need not look beyond the Respondent stopping in the middle of the road in anticipation of being stopped by the police to find that Cook had every right to approach the Respondent's vehicle and inquire as to why he stopped his vehicle in such a manner as to block all potential traffic attempting to travel in the roadway that was blocked by the Respondent's truck.

Accordingly, the Respondent is found Guilty as charged of Specification Nos. 2 and 3, and Not Guilty of Specification No. 1.

Disciplinary Case 82607/07

Specification No. 1

The Respondent is charged with failing to comply with the order of Inspector Kevin Holloran to attend an outpatient alcohol counseling program. I find the

Respondent Guilty because his failure to obey Holloran's lawful order prevented him from attending the outpatient program.

Subsequent to the Respondent's arrest for DUI he was suspended by the Department and directed to report to the Department's Medical Division. On January 24, 2007, he met with Sergeant Sweeney of the Employee Relation Counseling Services Unit for the purpose of attending an outpatient alcohol counseling program. Sweeney testified that recommendations were made to the Respondent "on steps to be taken to get back to full duty." Sweeney, during his limited testimony, informed this Court that the Respondent told him that "he wouldn't take the recommendations."

Inspector Holloran also met with the Respondent on January 24, 2007. Holloran received a call from the Counseling Unit informing him "that they were sending [the Respondent] over there, and I was then to meet with him to order him, give him a directive to comply with *ALL* (emphasis added) the orders of the Counseling Unit." Holloran's understanding of the Counseling Unit's concern was that "he was refusing to comply with their recommendations..."---with the directives of the Counseling Unit in that he refused to enter the outpatient program "because he wanted conditions set and so he wouldn't comply completely with what they were directing him to do." Ultimately, Holloran told the Respondent that he was "giving him a direct order to comply with the directives of the Counseling Unit."

Under Patrol Guide section 203-03, "Compliance With Orders, General Regulations" members of this Department, a paramilitary organization, are required to "Obey lawful orders and instructions of supervising officers." Holloran gave the

Respondent a direct order to comply with the directives of the Counseling Unit and he failed to comply with that order.

The Respondent testified that during his meeting with Sweeney he was ordered to attend an outpatient counseling program. He explained that Sweeney gave him a contract and went over "a whole list of requirements" with him and then ordered him to sign the contract. He signed the contract, but under his signature he signed it "under duress." The Respondent's stated reason for signing the contract the way he did was because it was his understanding that they wanted him to sign it "voluntarily." His position, however, was that "It was not voluntary. I was being ordered. They weren't paying me for that time after my eight and a half hour shift, so that's why I signed it under duress." He acknowledged that this was a job-related duress in that "they were ordering me to go somewhere on a voluntary basis on my own time."

After signing three separate contracts with "under duress" notations, he said that Sweeney told him that they would not accept "under duress" and tore up the contracts. Sweeney then sent him to the Medical Division to speak with Holloran. He acknowledged that he and Holloran "discussed the contract, and he asked me what it was. I said I have no problems signing it. I signed it under duress. He ordered me to go back to the counseling unit and sign the contract." He returned to Sweeney's office and again signed the contract with an "under duress" notation three times and was sent back to Holloran where he was suspended for failing to comply with the order to sign the contract.

The Respondent clearly disobeyed a direct order to obey the directives of the Counseling Unit which meant signing the contract without inserting the words "under

duress." The reason Holloran gave the order was for the purpose of getting the Respondent into outpatient counseling. The Respondent's failure to sign the contract as directed by Sweeney, and as the Respondent was well aware, meant that he could not enter the program even though he tried to convince this Court that he was willing to attend. He was aware of the programs requirements and disregarded them.

Moreover, the Respondent's reason for not obeying Holloran's order was not because it was an illegal order, such as committing a crime, which he would have a right if not an obligation to disobey. Rather, his reason was because he was not going to be paid for his time. That was his sole justification for his actions—signing "under duress" and jeopardizing his acceptance into the program. This Court, however, does not accept his excuse because the money issue could have easily been dealt with or grieved after he obeyed the order and attended the program.

Instead, in this Court's opinion, the Respondent's actions were a blatant disobedience of a direct order of a superior officer for nothing more than a defiance of authority. It matters not to the Respondent that he was arrested for driving under the influence of alcohol after having admitted to law enforcement officers that he had been drinking and observed operating a truck. It also matters not to the Respondent that the Department has a very serious and profound commitment in insuring that its members are unquestionably qualified to protect the community when they report for work in their law enforcement capacity. Rather the Respondent's sole interest was to modify the contract and enter the program under his terms or not at all. This was not acceptable to Sweeney or Holloran and it is certainly not acceptable to this Court.

Accordingly, I find the Respondent Guilty as charged.

Disciplinary Case 83275/07

Specification Nos. 1 & 2

The Respondent is charged in two specifications with having made in excess of 500 telephone calls to Scott and Danielle Niemann, with the intent to "harass, alarm or annoy" them. I find the Respondent Not Guilty because there was no credible evidence presented at trial to the support the allegations in these specifications.

At the outset, this Court was informed that Scott and Danielle refused to cooperate with the Department and appear to testify at this trial. The Assistant Department Advocate (Advocate) stated that both Scott and Danielle had been personally served subpoenas at their residence in Florida, New York to assure their appearances at trial; they nevertheless failed to appear. The Advocate also informed the Court that he had a telephone conversation with Danielle on the day that she was served the subpoena and was told by her that "she did not intend on coming down...she did specifically refuse to come down." Danielle informed the Advocate that she had made amends with the Respondent and was interested in "[putting] the cases behind her."

The investigating officer in this case, Diamantis, similarly stated that the Niemann's were not interested in cooperating. In response to this Court's inquiry, he said, "Throughout the course of the investigation, I did contact them. They were uncooperative... [w]ouldn't return phone calls, things of that nature." He also said that when he asked the Niemann's for a follow-up interview a month after their initial interview, they declined, with Scott saying that they "wanted to put this behind them."

It was Scott Niemann's complaint to the Internal Affairs Bureau that commenced the investigation that formed the basis for the charges against the Respondent.

Consequently, in the opinion of this Court, Scott's and Danielle's refusal to appear before this Court strongly implies that they do not want to give sworn testimony at a Department trial. As such their allegations against the Respondent cannot be heard and their demeanor cannot be observed first hand by this Court during direct and cross-examinations.

Their failure to appear also makes it impossible to gauge whether the Niemann's allegations actually occurred or were motivated by a bias towards the Respondent. This is especially relevant when focusing on the allegations made by Scott because his motivations could have been created by the fact that the Respondent was involved in a romantic relationship with his wife, Danielle.

Moreover, Diamantis testified that he interviewed both Scott and Danielle on the date the complaint was received, November 8, 2006, via telephone and recorded the interviews on audio cassette. During the trial, however, the Court learned that the audiotape containing both of these interviews was missing with no chance of it being located. Diamantis stated that he attempted to locate the tape, but concluded that it was lost beyond hope of recovery. Therefore, the only sources containing the substance of Scott's and Danielle's interviews was a "49" (DX1) signed by the Bronx Duty Captain and Diamantis' own recollections.

Placing so much weight on this 49 is troubling for a several reasons: Diamantis acknowledged that he did not sign this 49 or even prepared the document in its entirety. Rather, he stated it was a concerted effort between the members of the Bronx Investigations Unit and the Bronx Duty Captain, all of whom were present at the initial call out for this investigation on November 8, 2006. Moreover, when asked what portion

of the document he authored, Diamantis was unable to recall, stating, "I don't remember exactly which portion of it..."

The 49 contains two paragraphs, namely, four and five which represent Scott's and Danielle's interviews respectively. The section of the document representing Scott's interview indicates that he became aware of the Respondent's and Danielle's relationship via "gossip in the neighborhood." He also said that the Respondent "has been harassing him for several months since he and Danielle ended their relationship." The document goes on to say that Scott admitted returning the Respondent's calls on "numerous occasions in an effort to get him to stop the phone calls." Lastly, the paragraph cites an incident in which he alleged that the Respondent broke into his residence and was informed of this fact by Danielle a week after it happened. At trial, Diamantis said that Scott "believed" that it was the Respondent who broke into his house. For some unknown reason, however, Scott did not report this incident to the authorities, leaving this Court with considerable doubt that the event even occurred or that the Respondent's presence in their home was consensual.

The fifth paragraph, memorializing Danielle's interview indicates that she was in a relationship with the Respondent for one and a half years and recently broke up with him. It merely states, in part, "Mrs. Niemann stated that Officer Ehlers has been calling her continuously at home and on her cell phone for several months in an effort to rekindle their relationship. By her own admission, Mrs. Niemann stated that she returned his phone calls on a few occasions." The paragraph goes on to detail how Danielle told the Respondent to meet her at a bar where her husband was, for the purpose of provoking an altercation. She stated that the Respondent later confronted her about this, and she

alleged that he broke into her residence. It also mentions an allegation that the Respondent threatened her with a firearm, however, the document says she was "evasive" about this when being questioned.

Unfortunately, this document is uncorroborated by any other credible evidence. On its own it is hearsay and does not provide this Court with sufficient evidence which supports the Niemann's allegation that the Respondent's calls were intended to cause them to feel harassed, alarmed and annoyed as charged in the specifications. Accordingly, the weight that this Court can afford to this document is minimal, if any.

Furthermore, Diamantis did not seem to have much of an independent recollection of his investigation into the allegations in this case. In fact, each time he was asked a question, he had to refer to the 49. He acknowledged this, indicating that he could not recall from memory much of his investigation of the allegation against the Respondent.

The Department's telephone records in evidence (DX 2) contained a voluminous number of telephone calls from the Respondent to the Niemanns. What was said during the calls, however, remains unclear to this Court. The Respondent claimed that the purpose of his repeated telephone calls to Danielle was to get her assistance, ostensibly for a substance abuse problem that he said he discovered while the two were involved in a relationship. He also indicated that he had been in communication with Scott regarding the problem. While this may indeed be the case, it is hard to conclude otherwise because no reliable non-hearsay testimony was presented to dispute his claim.

It is also important to note that the Respondent testified that he reported to his Integrity Control Officer ("ICO") a telephone call that he received from Danielle where she threatened him. In a 49 drafted by the Respondent prior to the Niemann's complaint,

(RX B), he stated, "At around 0030 hours on October 23, 2006 [Danielle] called my phone repeatedly with threatening statements. She also said that she was going to call my place of employment and end my job by whatever means necessary." While this statement could conceivably be used for or against the Respondent with regard to the Niemann's allegations, no supporting or contrary evidence was presented because the Niemanns did not testify.

Diamantis admitted that he had this 49 prior to interviewing the Niemanns but he never questioned Danielle about the Respondent's allegation. In addition, he never re-interviewed Danielle about the Respondent's accusations because at that point she would no longer cooperate with his investigation. Diamantis also admitted to later discussing this matter with the Respondent's ICO, despite the fact that he did not create any worksheets reflecting this. More importantly, had Danielle appeared before this Court, she could have been confronted with the Respondent's claim that her allegations were retaliatory.

Based on the foregoing, this Court concludes that the Department has failed to prove the allegations in these two specifications by a preponderance of the credible evidence.

Accordingly, I find the Respondent Not Guilty of both Specifications.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell vs. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Police Department on January 20, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of operating a motor vehicle while his ability was impaired, refusing a breathalyzer test and refusing to comply with a lawful order to attend an outpatient counseling program. These charges are very serious in nature because they leave a strong impression that the Respondent has no regard for the law and by extension his commitment to enforcing the laws to which he has taken an oath to do. He also disobeyed an order choosing confrontation with a superior officer over a more appropriate means of voicing his objection.

Based on the foregoing and the Respondent's service record, I recommend that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at anytime without further proceedings. I further recommend that the Respondent forfeit a penalty of 60 days that he previously served on suspension, plus participate in ordered breath testing and any further counseling deemed necessary by the Department.

Respectfully submitted,

John Grappone
Assistant Deputy Commissioner - Trials

APPROVED
MAY 18 2009
RAYMOND W. KELLY
POLICE COMMISSIONER